In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-654

PACIFIC MARITIME ASSOCIATION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and its Locals 13, 63, 10 and 34, *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR WRIT OF CERTIORARI to Review a Decision of the Court of Appeals for the District of Columbia

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Petitioners, Pacific Maritime Association (PMA) and International Longshoremen's and Warehousemen's Union and its Locals 13, 63, 10 and 34 (ILWU), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in this proceeding on June 26, 1975.

OPINIONS BELOW

The Court of Appeals rendered no opinion herein but, for the reasons stated in the Decision and Order

of the National Labor Relations Board (Board) reported at 208 NLRB No. 130, enforced the Board's Order (see *Pacific Maritime Association v. NLRB,* 515 F.2d 1018). A copy of the Court's judgment is appended to this petition as Appendix A and a copy of the Board's Decision and Order is appended to this petition as Appendix B (App.).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on June 26, 1975. Timely petitions for rehearing were denied on August 11, 1975, and this petition for certiorari is being filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The Board has construed Section 8(e) of the Labor Management Relations Act of 1947 as amended, 29 USC 158(e) (the Act) to prohibit the execution of, and Section 8(b)(4)(i) and (ii)(B), 29 USC 158(b)(4)(i) and (ii)(B) to prohibit peaceful efforts by a labor organization to implement, a collective bargaining contract the object of which is to protect employees against the effect of technologically created job erosion because of the alleged effect of the contract upon third persons. In so construing these sections of the Act, the Board failed to consider that the work sought to be protected by the contract, the stuffing and unstuffing of modern containers, is fairly claimable by members of the collective bargaining unit as a substitute for work which they had historically and traditionally performed. The Court of Appeals enforced the Board Order without opinion. The questions presented are:

1. Whether this construction of Section 8(e) is contrary to the holding and rationale of *National Woodwork Manufacturers Association v. NLRB,* 386 U.S. 612 (1967) and *Houston Insulation Contractors Association v. NLRB,* 386 U.S. 664 (1967).

2. Whether the failure to consider that the work at issue is fairly claimable as a substitute for work historically performed is contrary to the rationale of the foregoing decisions of this Court and is contrary to the holdings of the Courts of Appeals for the Second, Third, Sixth and Eighth Circuits in *NLRB v. Local Union No. 28, Sheet Metal Workers International Association,* 380 F.2d 827 (2 Cir., 1967); *NLRB v. Local Union No. 164, International Brotherhood of Electrical Workers,* 388 F.2d 105 (3 Cir., 1968); *Canada Dry Corporation v. NLRB,* 421 F.2d 907 (6 Cir., 1970); *American Boiler Manufacturers' Association v. NLRB,* 404 F.2d 547 (8 Cir., 1968), *cert. den.* 398 U.S. 960 (1970), respectively.

STATUTORY PROVISIONS INVOLVED

This case involves the provisions of Section 8(e) and Section 8(b)(4)(i) and (ii)(B) of the Act. Those sections read in relevant part:

8(e):

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

8(b)(4)(i) and (ii)(B):

It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person . . .

Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

STATEMENT OF THE CASE

1. Introduction.

Petitioner PMA is a multi-employer, coastwide association of shipping, stevedoring and terminal companies which performs for twenty-four West Coast ports the function of handling all the labor relations matters of its members. Petitioner ILWU is the labor organization which represents West Coast longshoremen and was certified almost forty years ago as the statutory bargaining representative of "the workers who do the longshore work in the Pacific Coast ports of the United States . . ." *(Shipowners Association of the Pacific,* 7 NLRB 1002 [1938]).

This "longshore work in the Pacific Coast ports of the United States" is not an inconsiderable item in the national economic picture. Thus, as of June 1975 there were over 12,000 persons employed as longshoremen by approximately 114 companies on the Pacific Coast of the United States. In the year 1974 they handled almost 75,000,000 tons of cargo worth almost twenty-four billions dollars across West Coast docks, and earned aggregate wages of almost $215,000,000.

This case involves a Decision and Order of the Board, affirmed without opinion by the Court of Appeals, which struck down provisions of collective bargaining agreements known as the Container Freight Station Supplements (CFSS), reached between PMA and ILWU. These provisions were designed to soften, in some measure, the adverse economic impact on longshoremen of a recently developed cargo handling technique known as containerization.

Containerization is essentially the utilization of large specially constructed boxes into which cargo is "stuffed" (loaded) and which are then placed aboard ship for ocean transport and from which cargo is "unstuffed" (unloaded) at the completion of the voyage. Ships have been specially built to accommodate containers; special equipment (container cranes) has been designed and put into use and special facilities (container yards and container freight stations) have been established to accommodate the new technology.[1]

As a result of these new technological developments the preliminary work of assembling cargo before it is loaded aboard a vessel which formerly was done by longshoremen at the dock (or its disassembly there after it was unloaded from the ship) has been substantially reduced and much of it is now being performed by non-unit employees at places away from the docks.

Generally speaking, the collective bargaining agreements here at issue provide that the stuffing and unstuffing of containers carried aboard vessels owned or stevedored by members of petitioner PMA shall be

[1]These new technical developments in cargo handling have posed problems not only in the law of labor relations, but in other areas of the law as well. (*Royal Typewriter Co. etc. v. M/V Kulmerland*, 483 F.2d 645, 649 [2 Cir. 1973] ["Until the adding machine cartons were packed in the container . . . they were not suitable for ocean transportation or handling"]; *Standard Electric v. Hamburg S.D.G.*, 375 F.2d 943, 945 [2 Cir. 1967] [". . . [f]ew . . . could have foreseen the change in the optimum size of shipping units that has arisen as a result of the technological advances in the shipping industry"]; Sen.Rep. 92-1125, 92d Cong., 2d Sess. [September 14, 1972] p. 13 [". . . with the advent of modern cargo handling techniques, such as containerization. . . . more of the longshoremen's work is performed on land than heretofore"].)

performed at the docks by employees represented by petitioner ILWU. There are substantial exceptions to this contract coverage (shippers loads and cargo in the door-to-door trade) with the net result that even if these contracts were permitted to be carried out they would affect only about 15 percent of the containerized cargo on the West Coast. But it is precisely this 15 percent which represents the jobs which the longshoremen have directly lost in recent years.

The Board found that "technological advances had seriously diminished available work for longshoremen" (App. vi);[2] that "the ILWU was concerned at the loss of longshore work . . . and therefore sought and obtained from PMA the so-called Container Freight Station Supplements . . ." (App. viii); and that "the loss of work on the docks, whether due to the use of large containers or other technological improvements, is certainly a matter of legitimate concern to the ILWU" (App. x). Nonetheless, the Board held that the CFSS violated Section 8(e) of the Act and that ILWU's peaceful attempts to implement it violated Section 8(b)(i) and (ii)(B) because PMA and ILWU had, in attempting to resolve these work loss problems "affect[ed] the rights of other employers and their employees" (App. xii). This holding, given the findings that the ILWU was legitimately concerned about the serious diminution of work caused by containerization and *therefore* sought and

[2]Earlier, the Second Circuit had recognized this fact: "The result of this containerization has been a marked reduction in the demand for longshore labor." *International Container Transport Corporation v. New York Shipping Association*, 426 F.2d 884, 886 (2 Cir. 1970).

obtained the CFSS, directly conflicts with this Court's decisions in *National Woodwork* and *Houston Insulation, supra,* and with the decisions of the Courts of Appeals cited at page 3, *supra.*

2. Historical background.

(a) ILWU is the certified bargaining agent for West Coast longshoremen.

Modern labor relations in the longshore industry on the West Coast began with the agreement between the predecessors of PMA and ILWU to submit the 1934 strike to an arbitration board appointed by President Franklin D. Roosevelt. The award issued by that board became the basis for a labor relations structure that has at all times since then included a registered work force, decasualization of employment and rotary hiring through a jointly operated dispatch hall. In 1938 the National Labor Relations Board, then recently created by the Wagner Act of 1937, gave its approval to these arrangements by certifying the ILWU as the statutory collective bargaining representative of "the workers who do the longshore work in the Pacific Coast ports of the United States . . ." *Shipowners' Association of the Pacific Coast,* 7 NLRB 1002, 1041 (1938).

(b) West Coast longshoremen historically assembled cargo for loading on the docks and disassembled it after discharge on the docks.

Prior to and at the time of the Board's 1938 certification, cargo which was to be loaded aboard vessels was brought to docks in small miscellaneous lots. Such lots of cargo were placed on ropes or net slings by longshoremen and then hoisted aboard the vessel by

longshoremen using the ship's winches. As time went on, cargo handling techniques became more sophisticated, more powerful winches (and, later on, cranes) were utilized and the size of the units handled by the longshoremen grew larger and larger. Individual lots of cargo were prepared for loading, they were put together, unitized, banded, glued, palletized—so that they could be handled more quickly, more efficiently and in a safer manner. The reverse of this operation took place when cargo was unloaded from the ships and the units were broken down—depalletized and unbanded—so that they could be prepared for movement to the individual consignees.

This work of assembling the cargo on the docks and putting it in the form in which it was to be loaded aboard the vessel and of disassembling it when it was unloaded and of moving it across the docks has historically been exclusively performed by the longshoremen.[3] This work included the placing of cargo into, and taking it out of, the various types of boxes that were used before the modern container came into

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[3]In its 1938 certification the Board had held that the term longshoremen "quite frequently includes everyone who works *either* on board ship *or* on the docks" (7 NLRB 1025; emphasis supplied). It specifically included in the bargaining unit "dock men" (*id.* 1033) and "dock workers" (*id.* 1035).

See also the following uncontradicted testimony:

"Q. Now when it was turned [sic: *time*] to load that cargo aboard a vessel, the cargo had to be assembled and placed on a pallet board, or whatever had to be done to load it on the vessel, the longshore employees of PMA did that; took it from the shed and assembled it and did whatever had to be done to put it aboard the vessel?

A. Right.

Q. And conversely when a vessel was unloaded the cargo would come off the vessel either on pallet boards or loose or whatever method they used for unloading; the longshoremen

being. In his Brief to the Court of Appeals (pages 4-5, 9), General Counsel for the Board conceded that this was traditional and historical work of longshoremen.

(c) New cargo handling techniques in the 1940's and early 1950's and their effect upon labor relations.

Throughout the 1940's and 1950's newer and more efficient methods of cargo handling, with larger, newer and more efficient machines and employing larger boxes which ultimately became containers, were introduced on the docks. All of this was vigorously resisted by the longshoremen since every new advance meant a shorter time and less men to do the job.[4] The result was more than a decade of stormy labor relations, job actions and strikes.[5]

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would remove that cargo from the vessel and place it into the shed?

A. Correct.

Q. And if the cargo had to be broken down either from high piles or [in] any other way, that would be broken down at this point; getting the cargo into the shed and breaking it down, was something that longshoremen did?

A. Correct." (Transcript of Proceedings before the National Labor Relations Board herein [Tr.] 578-579).

[4]See, *e.g., International Longshoremen's and Warehousemen's Union* (*American Mail Line, Ltd.*), 144 NLRB 1432, 1442 (1963): "There is little question but that it is the work of the individual longshoremen which in the course of time is being adversely affected by the increased use of mechanized equipment."

[5]"The history of maritime labor relations in this country has been punctuated with lengthy major strikes and continuous minor disruptions." *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 296-297 (1968) (Douglas J., concurring.

See also Maritime Labor Board, *Report to the President and the Congress*, H.R. Doc. No. 646, 76th Cong., 3rd Sess., (1940); Schneider, *Industrial Relations in the West Coast Maritime Industry*, Institute of Industrial Relations, University of California (Berkeley, 1958); Kosoris, *Working Rules in West Coast Longshoring*, 84 Monthly Labor Review 1 (1961).

By the late 1950's, both sides—ILWU and PMA—began to understand that some way had to be found out of the impasse which had reduced collective bargaining almost to chaos and which had brought the industry on the West Coast to an untenable competitive position. However, it took some time for the forward-looking leadership on both sides, first, to convince each other of their own good faith, and, second, to convince their followers that a new approach was required.

(d) The Mechanization Agreement of 1960.

By 1960, the parties were able to adopt a "Modernization and Mechanization Agreement". This Agreement, to quote the Board,

> ". . . recognized for the first time that technological advances had seriously diminished the available work for longshoremen and attempted to accommodate the legitimate interests and needs of both parties . . ." (App. vi).[6]

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[6]This Court has called this mechanization contract

> "a milestone agreement which, it was hoped, would end a long and troubled history of labor discord on the West Coast waterfront" and "an enlightened and forward-looking step in the West Coast Longshore Labor relations." *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. at 264 and 264, n.1 (1968).

Mr. Justice Harlan said, in concurrence:

> "This . . . labor agreement was, according to apparently unanimous industry and expert opinion, a highly desirable step forward in the shipping industry" (*id.* 283).

See also *International Longshoremen's and Warehousemen's Union* (*American Mail Lines*), 144 NLRB 1432, 1442 (1963) ("a history making precedent, a peaceful settlement of a problem that has troubled the West Coast waterfront for a number of years."); *International Longshoremen's and Warehousemen's Union* (*Howard Terminals*), 147 NLRB 359, 366 (1964) ("a pioneering settlement . . . of manpower and economic problems resulting from the increasing use of mechanized equipment on the waterfront [which] may well serve to promote industrial peace in this area of American industry").

From ILWU's point of view the heart of the agreement was, as described by the Board in the instant case, that

> "In return for the Union's relinquishment of make-work practices, it was . . . agreed . . . that the operation of all new equipment on the docks would be performed by longshoremen . . ." (App. vii).

(e) Subsequent developments: The late 1960's.

During the early 1960's, the mechanization agreement seemed to have solved the problems created by the early changes in technology. However, at that time containerization as it is now practiced in the longshore industry was, unbeknownst to the parties, still in its infancy and, as the Board noted, developments throughout the next decade changed the picture radically:

> ". . . with increasing acceleration, shipping companies began to adopt, some exclusively, the new method of transporting cargo known as 'containerization'. The use of boxes or bundles on or off pallets became a less desirable and uneconomical method of handling cargo in the new technology . . . [S]teamship companies converted their vessels to carry containers or constructed new ships solely for that purpose. Obviously, the larger and more self-contained the load, the less work for longshoremen to load or unload the ship and, as a parallel, the less time in port for the ship, with substantial savings to the shipping industry." (App. vii-viii).

As the Board further noted, "[t]he development of this method of carrying freight *gave rise* to the establishment of container freight stations" (App. viii; emphasis added). It is at these container freight stations that other persons now perform, away from the docks, the assembling and disassembling of cargo which had previously been done by longshoremen on the docks.[7]

The containerization of the industry continued with rapidity throughout the decade and by 1968 it became a veritable explosion. By 1969, 20% of all cargo handled across West Coast docks was containerized and by 1970 the figure had risen to over 25% (General Counsel's Exhibit 2P before the National Labor Relations Board). The effect of these developments on longshore jobs opportunities was dramatic. Between 1969 and 1970 the total hours worked by West Coast longshoremen had dropped by some 5,000,000 from over 31,000,000 in 1969 to 26,000,000 by 1970 (General Counsel's Exhibit 2Q)—a loss of almost 20%.[8]

The stuffing and unstuffing of containers had become a substitute for the dock work which longshoremen had previously performed. In some instances, such as those which are at the heart of the contro-

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[7]One intervenor, California Cartage Company, Inc. (Cal Cart) had no employees regularly engaged in this work prior to 1965 (Tr. 81, 114-115) and the other, Pacific Motor Trucking Company (PMT) had only two employees who occasionally did this work before 1965 (Tr. 438, 440, 454).

[8]A comparison of the manhours required to load a conventional vessel, for which the cargo has to be assembled on the dock and stowed in the hold, with the manhours required to load a containerized ship, for which the cargo is, in effect, already preassembled and pre-stowed, tells the story: work which required in excess of 10,000 manhours in the former case can be done in approximately 300 manhours in the latter (Tr. 1165-1166, 1182).

versy here, the work was moved away from the docks where it had been performed by longshoremen and transferred to container freight stations operated by non-unit personnel.[9]

(f) Longshore work history involving the container.

In addition to the exclusive history of longshoremen performing piece-by-piece cargo handling on the dock (work for which the container has become a substitute), longshoremen also have traditionally and historically performed stuffing and unstuffing work on various kinds of containers up to and including modern containers. The predecessor of the modern container goes all the way back to 1924 when longshoremen stuffed and unstuffed small wooden crates. (App. vii). Prior to World War II, longshoremen were used regularly to stuff 4 x 6 foot "van packs" for the military. These "van packs" carried household goods and thousands were stuffed in the period before the war. (Tr. 642-643, 678). After World War II there was a gradual development of various kinds of containers. They ranged in size from 4 x 8 to 8 x 8 to 8 x 12. Again to the extent such containers were used, longshoremen performed the work of stuffing and unstuffing them (Tr. 906, 997, 1014, 1097-1098).

The first modern container appeared in 1958 and the first modern container station was opened by PMT in 1959. (Tr. 438). This latter was a small operation involving only two full-time employees. (Tr. 438, 440,

[9]Prior to 1968, before the move away from the docks began in earnest, *longshoremen stuffed containers for the very shipping lines for whom Cal Cart and PMT now perform this service* (Tr. 116, 438, 853, 865).

454). At the very time that this operation was going on, bargaining unit employees were stuffing and unstuffing containers at the docks under the ILWU-PMA contract. (Tr. 853, 865, 1036, 1102). Cal Cart did not start its container freight station until 1965-1966 (Tr. 81, 114-115). It did not obtain the container work from shipping lines which had been having their modern container work performed by longshoremen at the docks until late in 1968. (Tr. 116).[10] By the time this litigation commenced in 1971, however, both companies together had converted what were small operations in 1965 (approximately 10 full-time employees at a maximum) to operations involving 100 to 135 employees. In his Brief to the Court of Appeals (pages 10-11), General Counsel for the Board conceded that longshoremen did and do perform stuffing of modern containers whenever that was and is done at the docks.

Although during this development longshoremen continued to perform work on the modern container on the dock in fairly substantial amounts, with the increased growth of off-dock stations manned by non-unit personnel and with the veritable explosion in the use of containers in 1968, the loss of work by longshoremen had reached such serious proportions that, when the issue was not initially resolved, the longshoremen went on strike over it. *Pacific Maritime Association v. International Longshoremen's and Ware-*

[10]Beginning in 1968, when Cal Cart and PMT became more involved in the container freight station business, their employees began to stuff the less-than-container-loads which are involved in this case, prior to that time, these employees had stuffed principally shippers' loads, which are not involved in this case.

housemen's Union, 454 F.2d 262 (9 Cir., 1971). This strike, in the middle of the contract term, was the first strike since industrial peace had been reestablished on the West Coast waterfront in the 1950's (*supra,* p. 11) and was the direct result of the economic pressure being felt by the rank and file longshoreman as a result of the impact of containerization on his job opportunities.

3. The negotiation of the container freight station supplements.

In these circumstances and to meet this threat to the work force, PMA and ILWU, in collective bargaining, negotiated the CFSS.

The Board put it succinctly:

> "As the decade of the 1960's neared its end, the ILWU was concerned at the loss of longshore work to an extent not contemplated in the 1960 Agreement, and therefore sought and obtained from PMA the so-called Container Freight Station Supplements to their collective-bargaining contract. These Supplements were executed on January 5, 1970, and February 10, 1972, and provided, in effect, that all stuffing and unstuffing of containers to be loaded or unloaded from ships docking in Pacific Coast ports, except for shippers' loads and door-to-door deliveries, was work to be performed by ILWU members. The intent of the 1970 Supplement was to bring container work 'to the dock or to areas adjacent to the dock on or before June 30, 1971'." (App. viii-ix).

The 1970 CFSS sought to achieve this objective by providing that the stuffing and unstuffing of containers might be performed by PMA members either under

the terms of the basic longshore contract or, at the option of the employers, by the longshore work force at a "Container Freight Station", which it defined as "a permanent facility on a dock or in a dock area". (General Counsel's Exhibit 2C, Section 1.12). However, it specifically excluded from its coverage shippers' loads and door-to-door shipments (*id.* Sections 1.533, 1.541, 1.542).

The 1972 CFSS spelled out the objective:

> ". . . to *protect and preserve the established work of employees* covered by the PMA/ILWU Pacific Coast Longshoremen's & Clerks' Agreement and this CFS Supplement at *docks or areas adjacent thereto.*" (General Counsel's Exhibit 3, Section 1.5; emphasis supplied).

It provided for a tax of $1.00 per ton[11] on containers not stuffed or unstuffed by unit employees, *except* for shippers' loads, door-to-door loads, loads destined to or from retailers or wholesale warehouses, factories, or processing plants, within a defined "Port Area CFS Zone", and cargo shipped in the coastwise or intercoastal trade (*id.* Section 1.53).

4. The limited scope of the container freight station supplements.

The CFSS was narrowly drawn to meet the precise evil to which it was directed—the loss of work on the docks.

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[11]The tax is to be used as an offset toward the cost of the Pay Guarantee Plan for the employees, with any surplus to be used to reduce unfunded past service Pension liability. (*id.*).

As the Board noted, the agreement relates to only a "small portion of the work of stuffing and unstuffing containers since shippers' loads, representing 85 percent of that work, are not included." (App. xiii). Such loads (and door-to-door loads) are containers fully stuffed by the manufacturer or consignor generally at a point a considerable distance from the docks and which are loaded directly aboard the vessel and move directly to the consignee or purchaser (Decision of Administrative Law Judge before the National Labor Relations Board [ALJ Decision] 11, n. 10. The CFSS applies to only less than full container loads, that is, to "a container whose contents have more than one consignee and generally more than one owner consignor and *by necessity must be packed or stuffed* (or if inbound unpacked and unstuffed) *at a point very near the port or wharf where the ship will be moored or berthed.*" (*Id.*; emphasis supplied).[12]

It is this collective bargaining effort—narrowly drawn to meet a specific evil—which has been stricken down as violative of Section 8(e).

The 8(b)(4) violation found against the ILWU and its Locals 13 and 63 consisted solely of efforts, directed only toward PMA members who employ unit employees, to enforce the collective bargain. Thus the

[12]Additional evidence of the care with which the agreements were drawn to reach only dock work and to prevent, so far as possible, against reaching out beyond that area is to be found in the fact that a transition period was provided to have the work "brought to the dock or in areas adjacent to the dock" (General Counsel's Exhibit 2C, Section 1.5) and in the fact that the transition period will be extended to accommodate existing collective bargaining contracts. (*Id.* Section 1.51).

International sent a letter to its locals "to see to it that all containers not stuffed by the registered work force will not be loaded aboard ship . . . unless such loads fall under the exception of manufacturers loads, military cargo, door-to-door . . ." (ALJ Decision 18). The locals' agents strictly limited their efforts to ILWU-represented personnel and to PMA employers. At no time did they approach, or discuss the matter with, any persons other than their own members or their own employers (*id.* 19-20).

It is thus clear that the total thrust of the ILWU's activity, both in negotiating the CFSS and in seeking to enforce it, was directed to its own employers and was not addressed to the labor relations of the intervenors or anyone else.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH NATIONAL WOODWORK MANUFACTURERS ASSOCIATION v. NLRB, 386 U.S. 612 (1967).

(a) National Woodwork held that a collective bargaining contract aimed at preserving traditional bargaining unit work did not violate Section 8(e) of the Labor Management Relations Act, "however severe" might be its effect on third parties. The necessary implication of the decision is that the bargaining unit may seek to perform work which is the technological substitute for its traditional work.

Eight years ago this Court decided the case which has become the standard against which the application of Section 8(e) to work preservation clauses in collective bargaining contracts must be measured. *National Woodwork Manufacturers Association v. NLRB,*

386 U.S. 612.[13] In that case the labor organization had obtained a contract pursuant to which carpenters were not required to handle wooden doors which had been prefabricated elsewhere (386 U.S. 615-616).[14] Instead the preparatory work was to be done at the job site by unit employees.[15] In upholding the contract against the charge that it violated Section 8(e), the Court elucidated the standards which differentiated situations in which it was lawful from those in which it was unlawful for an employer and a labor organization to agree that particular work must be assigned to employees represented by the labor organization rather than to other employees.

In essence, the Court held that, despite its literal language, Section 8(e) does not prohibit an agreement which seeks to preserve work traditionally and historically performed by members of the bargaining unit (386 U.S. 635) and which is not "calculated to satisfy union objectives elsewhere" (*id.* 644). In addition, the Court held that "however severe" might be

[13]On the same day, the Court decided *Houston Insulation Contractors' Association v. NLRB*, 386 U.S. 664 (1967) which amplified the principles expressed in *National Woodwork*.

[14]In *Houston Insulation*, the employers had agreed not to contract out work relating to the preparation of pipe and boiler coverings (386 U.S. 665-666). The effect of both these agreements was to require the work to be done by what obviously were technologically less advanced and more costly methods. Contrary to the effect of those agreements, the CFSS permits, rather than inhibits, technological change. It does not prohibit the use of new equipment. All it requires is that the members of the bargaining unit, rather than others, shall work on such equipment.

[15]This is the very essence of the CFSS: Not to have the preparatory work of stuffing containers before they are loaded aboard ship done elsewhere but rather to have it done by the longshoremen at their dock-side job site.

the effect of such a contract upon the other persons, that factor did not transform an otherwise lawful primary agreement into an unlawful secondary one. (386 U.S. 627). All such agreements (whether valid or invalid) will have some such effect.[16]

While the facts of the case involved the preservation of jobs done in the traditional manner, the necessary implication of the decision is that bargaining unit employees may also seek to perform work which, by virtue of improved technology, takes the place of that which they had traditionally performed. The Court noted that the problem of technological unemployment was of great and continuing concern to the Nation and the Congress and stated that it could not impute to Congress an intent, in enacting Section 8(e), to preclude collective bargaining agreements aimed at easing "this most vital problem created by advanced technology." (*id.* 640-642).[17]

[16]Even before *National Woodwork*, the Court had rejected the "effect upon others" test as a standard by which to judge the legality *vel non* of labor activity. *Local 761, International Union of Electrical, Radio and Machine Workers v. NLRB*, 366 U.S. 592 (1961). Subsequently, the courts of appeals (including, until the instant case, the court below) have consistently so held. *Local No. 742, United Brotherhood of Carpenters and Joiners v. NLRB*, 444 F.2d 895, 901 (D.C. Cir. 1971), *cert. den.* 404 U.S. 986, (1971); *American Boiler Manufacturers Association v. NLRB*, 404 F.2d 547, 552 (8 Cir. 1968), *cert. den.* 398 U.S. 960 (1970); *NLRB v. Local Union No. 164, International Brotherhood of Electrical Workers*, 388 F.2d 105, 107 (3 Cir. 1968); *NLRB v. Local Union No. 28, Sheet Metal Workers International Association*, 380 F.2d 827, 830 (2 Cir. 1967). The Board also has heretofore so held. *Highway Truck Drivers and Helpers etc., Local* 107, 159 NLRB 84, 99 (1966).

[17]The Court turned aside an argument that to allow work preservation clauses under Section 8(e) would impede technological and economic progress, stating that such a contention should be addressed to the Congress (386 U.S. 644). Since that decision Congress

In determining whether an agreement is a lawful work preservation agreement, consideration is to be given to the "remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted and the economic personality of the industry." (386 U.S. 644, n. 38).[18]

(b) The decision below conflicts with National Woodwork since it invalidated a collective bargaining contract because it allegedly affected or might affect third parties and also because the decision did not consider that the work involved was the technological substitute for the work historically performed.

(i) The decision below impermissibly considered the alleged effect of the contract upon others.

One of the main premises underlying the decision below was the Board's obvious concern that the CFSS might have an adverse effect upon other persons. The Board explicitly stated that since PMA and ILWU had early on been able to agree to a solution that eliminated restrictive work practices, they ought to be able to reach a similar agreement now without "affecting the rights of other employers and their employees" (App. xii).

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has not modified this Court's view that under Section 8(e) an agreement to preserve traditional work is lawful even if it means adherence to outmoded and inefficient work practices. Clearly then Section 8(e) should not invalidate a contract which accommodates to technological change.

[18]The Board's factual findings establish that, applying these criteria to this case, the CFSS is a primary, not a secondary, agreement; that it is concerned with a direct threat of job replacement; and that it concerns ILWU's relations with PMA and has no objectives elsewhere.

But the application of such a standard, "however severe" the impact on others may be, is directly contrary to the holding of *National Woodwork* (and to the holdings of the Courts of Appeals for at least three other circuits [*supra*, n. 16]).

The Board attempted to distinguish this square holding of *National Woodwork* by saying that a boycott to enforce a claim to stuff shippers loads (although it recognized that such loads are explicitly excluded from the CFSS) "would have an enormous impact upon the shipping industry" (App. xiii). There are two reasons why we need not enter into a semantic argument which seeks to distinguish this Court's "however severe" test from the Board's "enormous impact" test. The first is that the Board had no business under this Court's decision (and the decisions of the courts of appeals) to apply any such test at all. Thus, since the Board has applied a patently improper legal standard to the record here, its Order cannot stand. The second is that while the concept of a shipper's load has existed since at least before World War II (Tr. 672), no claims have been made by longshoreement to this work and the CFSS is carefully drawn to exclude any such claims.

The fact that no such claims have been made here leads, we submit, only to one conclusion: that the CFSS is truly a work preservation clause. The Court of Appeals for the Second Circuit has so treated a similarly limited agreement in another industry:

> ". . . the careful specification of the type of prefabricated products that were not to be used would

tend to support the view that the clause was a work-preservation clause" (*NLRB v. Local No. 28 Sheet Metal Workers International Association, supra,* 380 F.2d at 830).[19]

In essence, the Board's position is that, since a claim for more *might be* unlawful, a claim for less *is* also unlawful. This makes no sense either logically or practically. Mr. Justice Holmes condemned such reasoning nearly 50 years ago when he observed, in another context, that "the power to tax is not the power to destroy *while this court sits.*" (*Panhandle Oil Co. v. State of Mississippi,* 277 U.S. 217, 223 [1928]; emphasis supplied). If the day should ever come that the ILWU asserts a broader claim to container stuffing work than is presently the case, the Board and the courts will be able to deal appropriately with it. In the absence of such a claim here it was improper for the Board to have made the legality of the present agreement turn on hypothetical speculation.

From a common sense viewpoint, the lack of a claim for shipper's load work ought to be viewed as a factor favoring the legality of the CFSS. Indeed, the Board, in *United Brotherhood of Carpenters and Joiners of America, Local 112,* 200 NLRB 205 (1972), stressed the evidence of the carpenter's willingness to permit the use of some modular home building techniques as establishing a good faith work preservation objective.

In sum, the agreement's effect on others is not a valid adverse criterion under *National Woodwork;*

[19]Just so, the CFSS carefully specifies that it covers only less than container loads. It imposes no restrictions on the stuffing of shippers loads.

certainly the petitioners' attempt to limit the scope of their agreement's effect on others ought to be viewed as a positive factor in favor of its legality. If not, the Board's reasoning will have created a labor relations version of *Catch 22* in which preserving less becomes the same as acquiring more.

(ii) The decision below failed to consider that the work covered by the contract was a technological substitute for traditional unit work.

A second equally significant conflict of the decision below with *National Woodwork* lies in its failure to consider petitioners' contention that, under Section 8(e) and the rationale of *National Woodwork* an agreement to assign the technological successor of what has been traditional work is also valid work preservation.

As we have previously noted, the necessary implication of the decision in *National Woodwork* is that the bargaining unit may seek to perform such successor work.[20] The Board never once addressed this issue, but its decision when read in the light of the facts of this case means that a union may *not* seek to perform such work.

In this case the petitioners have not attempted to preserve the old system at the expense of progress.

[20]In *Local No. 433, United Brotherhood of Carpenters and Joiners v. NLRB,* 509 F.2d 447 (D.C. Cir. 1974) the court below had correctly held that the issue of whether the new materials used on the job were "substituting materials" for those previously used by the unit employees was "crucial" in determining whether the installation of those materials was "clearly claimable unit work." (509 F.2d 452, n. 30).

Unlike the carpenters in *National Woodwork* who prohibited the use of precut doors, PMA and ILWU have agreed that the new work method is permissible but have merely specified that if the new method is to be used it should be performed by longshoremen on the docks.

Had petitioners followed the same path as the unions and the employers followed in *National Woodwork* and in the subsequent construction cases in which prefabricated products were flatly prohibited, they would undoubtedly not now be before this Court. For such a case would have had to be viewed by the Board as a traditional 8(e) case in which a union whose members had always done the piece-by-piece handling of cargo on the docks was entitled, just as the carpenters in *National Woodwork* were entitled, to ban the introduction of any methods which displaced that work. Instead, however, PMA and the ILWU have been penalized for taking the more sensible and beneficial approach of working together to upgrade the industry and, in the process, of attempting to preserve to the longshoremen the new work which thereby became the substitute for their traditional work. This innovation may be enough to distinguish *National Woodwork* as a factual matter, but certainly not as a matter of the case's underlying policy. Indeed, the decision below has created a dangerous incentive for unions to insist upon the old ways of work and it is therefore appropriate for the Court to declare that its *National Woodwork* decision shall not be so distorted.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

(a) The courts of appeals have consistently held that Section 8(e) does not outlaw efforts to recapture work which has eroded from the bargaining unit or work which, because it is closely allied to traditional work, is fairly claimable by the bargaining unit.

Both before and since *National Woodwork* the courts of appeals have employed various analytical techniques in an effort to distinguish valid work preservation from invalid work acquisition agreements. These include what is known as the "work recapture" doctrine and also a mode of analysis in which the work in question is analyzed in terms of whether it is "fairly claimable". Petitioners submit that both are applicable here and, that, when applied to the facts found by the Board in this case, they sustain the legality of the CFSS.

(i) Under the "work recapture doctrine", an objective of re-acquiring work that has eroded from the bargaining unit is a primary and lawful objective.

In *American Boiler Manufacturers Association v. NLRB*, 404 F.2d 547 (8 Cir. 1968), *cert. den.*, 398 U.S. 960 (1970), the court of appeals explicitly rejected the contention that *National Woodwork* intended the term "traditional work" to encompass only "that work which is currently, continuously and exclusively performed by unit employees". (404 F.2d 551). The court noted that in *National Woodwork* one-third of the doors being shipped into the area at the time the charges were filed were already precut and that the use of blank doors may have been the

exception rather than the rule (*id.* 551 and 551, n. 7). Since, despite these facts, this Court had upheld the clauses involved, the court of appeals concluded that the term "traditional work" was not so limited.

While expressing no opinion as to whether such a clause is lawful if the objective is to acquire work which had "been completely lost" before the clause was negotiated, the court specifically held that

> "the term 'traditional work' includes work which unit employees have performed and are still performing at the time they negotiated a work-preservation clause." (*id.* 552).[21]

Applying these principles to the case before it, the court concluded that a clause in a 1963 contract requiring piping on boilers to be fabricated on the jobsite or in the shop of the plumbing contractor did not violate Section 8(e). Prior to the 1940's the union had done all such work on the jobsite, but by the time of the 1963 agreement 60 to 85 percent of the boilers installed in the area already had prefabricated piping. Despite this almost complete erosion of the work, the Eighth Circuit found the clause lawfully preserved traditional work.

The decision below is in clear conflict with, although it never mentions, this holding in *American Boiler*.

Similarly, the District of Columbia Court of Appeals had, prior to *National Woodwork*, recognized the legitimacy of a work recapture objective. *Meat*

[21]It is clear from the Board's findings here that, at the very least, the longshoremen had not "completely lost" the work of stuffing and unstuffing containers and that they were still performing it at the time the first CFSS was negotiated in January of 1970.

and Highway Drivers, etc., Local 710 v. NLRB, 335 F.2d 709 (D.C. Cir. 1964). There, the delivery of meat from packing houses in the Chicago area to local customers had been the work of local drivers. Subsequently "extensive changes in the distribution of meat products were effected as the major packers moved . . . their . . . operations outside of Chicago". While the local drivers continued to make deliveries from the remaining local packing houses, deliveries were increasingly being made by over-the-road drivers whose runs originated outside the Chicago area.

> "It was to the *problem of recovering the jobs lost* by the local drivers in the Chicago area and retaining those still performed there that the Union addressed itself in the 1961 negotiations". (335 F.2d 712; emphasis supplied).

The union obtained an agreement providing that all deliveries within the Chicago area must be made from a Chicago (i.e.—not an out-of-state) facility (*id.* 711 n. 3).[22] The Board held the clause violated Section 8(e) because the delivery of out-of-state shipments had not been performed by unit employees: all the latter had ever done was to handle local deliveries (*id.* 713).[23]

The court of appeals reversed the Board because the purpose of the agreement was to preserve jobs ("delivery in the Chicago area irrespective of the origin

[22]Just so, the CFSS provides that less than container loads shall be stuffed at or near the docks, not at facilities away from the docks.

[23]This rationale of the Board, which in any case was reversed by the Court of Appeals, *infra*, is not applicable here for there is no question that longshoremen have in fact stuffed and unstuffed modern containers. (*supra*, pp. 14-16)

of shipment") which were "fairly claimable" by the bargaining unit (*id.* 713-714).

> ". . . in the case before us, we have not work acquisition but work recapture. It is true . . . that in the past out-of-state shipments have on occasion been delivered to consignees in the Chicago area by the interstate carrier directly . . . But when the expiring agreement was originally entered into, practically all of the packing houses from which deliveries to the Chicago area were made were located in Chicago. Consequently, the union had no concern with the occasional shipment into the area via interstate carrier.
>
> "During the period of the expiring agreement, however, there was a dramatic change in the manner in which the employers here conduct their business. Most of the packing houses have been moved out of Chicago, so that now most of the shipments for the area are out-of-state shipments. It is understandable, therefore, that the union, in bargaining for a new agreement, turned its attention to these out-of-state shipments in an effort to require that the last leg thereof be made by local drivers. Thus the union, under its new proposal, is attempting not only to retain jobs for local drivers, but to recapture some of the work lost by the movement of packing houses out of Chicago. Unquestionably, this work is fairly claimable by the local drivers, and their union's efforts in their behalf in that direction fall easily within the legitimate area of collective bargaining." (*id.* 714).[24]

[24]The analogy, on the facts, between the instant case and *Meat and Highway Drivers* is literally overwhelming. With respect to the Board and the court below, may one ask how can the analysis we have quoted in the text apply to truck drivers in Chicago and not to longshoremen on the West Coast? The conflict in the decisions is obvious.

(ii) Under the "fairly claimable work doctrine", an objective of performing work which is closely allied to traditional work is a primary and lawful objective.

The Board's opinion also conflicts with those circuit opinions which establish that a work preservation objective can be present where the work in issue is "fairly claimable." In *Canada Dry Corporation v. NLRB*, 421 F.2d 907 (6th Cir. 1970), the Sixth Circuit upheld an agreement assigning certain work to the retail clerks' union even though the particular work in question, shelving certain brand name products, had never been performed by bargaining unit members.

> "Although the tasks of initially handling and shelving the particular brand name products in issue had not been traditionally performed by the store clerks, we do not regard the clerks' claim to these jobs as representing in any realistic sense an attempt to monopolize jobs or acquire new job tasks. Rather, these were the type of jobs which the clerks had traditionally done and for which they had the skills and experience. We agree . . . that it is unrealistic to define the area of the clerks' legitimate job protection efforts according to brand name or supplier.
>
> "Moreover, the record is devoid of any evidence of a secondary objective. There is no evidence that the union had any dispute with any of the bottlers or other suppliers; or that it was attempting to require the employees of the outside vendors to join the clerks' union; or that the union would allow the suppliers to shelve their own products provided they were represented by a union approved by the clerks." (421 F.2d 909-910).

Analyzing the work in dispute in terms of whether it was fairly claimable has also heretofore been the methodology of the court below. Thus in *Meat and Highway Drivers etc., Local 710 v. NLRB,* 335 F.2d 709 (D.C. Cir. 1964) it found that interstate delivery was so "closely allied—and in part identical" to the bargaining unit's historical work as to be fairly claimable. And in *Local 433, United Brotherhood of Carpenters and Joiners v. NLRB,* 509 F.2d 447 (D.C. Cir., 1974), the court below reversed the Board because it had "avoided the crucial issue whether haydite blocks were a *substituting* material [for other materials used in traditional carpenter work] *and thus constituted clearly claimable unit work.*" 509 F.2d 452, n. 30; emphasis added). See also *Sheet Metal Workers International Association, Local 223 v. NLRB,* 498 F.2d 687 (D.C. Cir., 1974).

(b) The decision below fails to consider either the "work recapture" or the "fairly claimable" doctrine; the effect of the decision, however, is to repudiate both.

Petitioners recognize that the decision below can be scrutinized with microscopic care without finding anything in it which would appear to reject the applicability of these doctrines to this case. Indeed, the decision below contains no reference to them whatsoever. This failure to consider these doctrines is not only frustrating since it forecloses an examination into their applicability here, but also it makes petitioning for certiorari much more difficult. While the conflict with existing law is not as readily apparent as it would have been had these issues been addressed, it is

real and it is substantial. The conflict cannot be avoided by the failure to address the work recapture and fairly claimable work issues.

(i) Work recapture.

Since it was found by the Board that the use of the container had led to a decrease in work opportunities for longshoremen and that it was the ILWU's legitimate concern with this fact which led it to seek and obtain the CFSS, an obvious work recapture issue was presented. The failure to address the issue cannot conceal the conflict between the holding in *American Boiler, supra,* and the result here, in the light of the findings of the Board and in the face of the uncontradicted evidence that longshoremen had done all the work to which the container had succeeded, had stuffed and unstuffed the predecessors of modern containers, had performed a substantial portion of modern container work, and had stuffed containers for the very customers who were replaced by intervenors prior to the time the work transfer occurred. The conflict is plain to see and needs resolution here as problems of technological unemployment continue to plague the American worker.

(ii) Fairly claimable work.

It is difficult to understand why retail clerks who had never shelved certain products on a supermarket shelf but who had generally shelved other products may legitimately claim the former work or why carpenters may claim new construction work they had never done before for the reason that such work be-

came a substitute for their traditional work, and yet longshoremen may not also fairly claim the work of stuffing and unstuffing containers. Such work is clearly "closely allied and in part identical" to the longshoremen's traditional work; it is a substitute for their traditional work; it is work longshoremen have been doing since the beginning of the modern container and which they had been doing on its predecessors. The refusal of the Board to deal with this issue creates a direct conflict between its decision and the holding in *Canada Dry Corporation, supra.*

CONCLUSION

The impact of technological change on American workers and the role collective bargaining can play in dealing with that problem now is and for some time has been one of the most important and controversial issues in labor relations. In *National Woodwork* this Court established a balance that favored collective bargaining as the technique to be employed on behalf of the worker threatened by increased technology and automation.

> "We cannot lightly impute to Congress an intent in §8(e) to preclude labor-management agreements to ease these effects through collective bargaining on the most vital problem created by advanced technology." (386 U.S. 642).

This Court also insisted that, despite the literal language of Section 8(e), collective bargaining agreements which sought to preserve work were not invalid

"however severe" the impact upon others. In the years since this Court struck that balance, a framework of analysis has developed involving such factors as work recapture and the concept of fairly claimable work in order to ascertain when a union and an employer have overstepped the line in their efforts to cope with these problems.

The decision below, however, ignored this Court's holding and departed from the analytical approach that has since developed and received the sanction of the several circuits. Considerations never before employed were interjected and, despite repeated urgings, no comment was even made on petitioners' contentions concerning the recapture of fairly claimable work. While this approach may have made it easier for the Board to reach the result here and while it may have thereby avoided the conceptual and practical difficulties that would have arisen had these issues been directly confronted, the difficulty of resolving a clearly presented issue should not be accepted by this Court as a reason for glossing it over.

Perhaps the Board and the Court of Appeals did not intentionally mean to signal a new approach and a backing away from the balance struck in *National Woodwork* and from prior doctrine, but the effect of the decision below is to do just that. It is thus necessary for this Court to intervene and to re-establish the underlying policy set forth in *National Woodwork*.

Nearly a decade has now passed since that case was decided and this case shows that new guidance is needed in this area. If it is not given in this case, not

only will substantial injustice have been done to these petitioners, but, more importantly, the decision below will stand to encourage unions to refuse in the future to cooperate with employers who wish to introduce new technological methods of performing work.

The petition for certiorari should be granted.

Dated, November 8, 1975.

Respectfully submitted,

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GIBSON, DUNN & CRUTCHER,
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PATSEY AND ANDERSEN,
Of Counsel.

(Appendices Follow)

APPENDIX

Appendix A

United States Court of Appeals
for the District of Columbia Circuit

September Term, 1974

Pacific Maritime Association, Petitioner, vs. National Labor Relations Board, Respondent, California Cartage Company, Inc., Pacific Motor Trucking Company, Intervenors,	No. 74-1266
International Longshoremen's and Warehousemen's Union; Local 13, et al., Petitioners, vs. National Labor Relations Board, Respondent, Pacific Motor Trucking Company, California Cartage Company, Inc., Intervenors.	No. 74-1296

[Filed June 26, 1975]

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board

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Before: ROBB and WILKEY, Circuit Judges and MERHIGE,* United States District Judge for the Eastern District of Virginia

JUDGMENT

These causes came on to be heard on petitions for review and cross applications for enforcement of an order of the National Labor Relations Board and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

Ordered and Adjudged by this Court that for the reasons stated in the decision and order of the National Labor Relations Board, 208 N.L.R.B. No. 130 (Feb. 11, 1974) the court is of the opinion that the findings and order of the Board are supported by substantial evidence on the record as a whole and that the petitions for review must be denied and the order of the Board enforced.

Per Curiam

For the Court

/s/ Hugh E. Kline
Hugh E. Kline
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 292(d)

Appendix B

208 NLRB No. 130

United States of America
Before the National Labor Relations Board

International Longshoremen's and Warehousemen's Union; Local 13, International Longshoremen's and Warehousemen's Union; and Local 63, International Longshoremen's and Warehousemen's Union, (California Cartage Company, Inc.),	Case 21—CC—1326
and	
Robert A. Curry,	
International Longshoremen's and Warehousemen's Union; Local 13, International Longshoremen's and Warehousemen's Union; and Local 63, International Longshoremen's and Warehousemen's Union, Respondent Unions,	
and	
Pacific Maritime Association, Respondent Employer,	
and	Cases 21—CE—103 21—CE—112
California Cartage Company, Inc.,	
and	
Pacific Motor Trucking Company, Charging Parties.	

International Longshoremen's and Warehousemen's Union; Local 10, International Longshoremen's and Warehousemen's Union; and Local 34, International Longshoremen's and Warehousemen's Union, Respondent Unions, and	Cases 21—CE—109 21—CE—111
Pacific Maritime Association, Respondent Employer, and	
International Cargo Services, Inc., and	Case 21—CE—116
Richmond Export Services, Inc., Charging Parties,	

DECISION AND ORDER

On October 19, 1972, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, General Counsel, Respondent Pacific Maritime Association,[1] the International Longshoremen's and Warehousemen's Union[2] and its Locals, and Charging Parties California Cartage Company, Inc., and Pacific Motor Trucking Company,[3] filed exceptions and supporting briefs. The General Counsel, Respondents PMA and ILWU, and Charging Parties PMT and California Cartage Company, Inc., also filed answering briefs. Charging

[1]Hereafter referred to as PMA.
[2]Hereafter referred to as ILWU.
[3]Hereafter referred to as PMT.

Party PMT filed a motion to strike the two briefs filed by Respondent which pertain to other cases beyond the records herein, and Respondent ILWU filed a motion for oral argument.

On September 13, 1973, oral argument was heard before the Board[4] in the instant cases and in Cases 21—CD—298, 21—CD—308, and 21—CD—314, in which the General Counsel, Charging Parties California Cartage Company, Inc., and PMT, and Respondents PMA and ILWU participated. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 692, also participated.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and oral argument and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as herein modified.[5]

[4]Without objection from any of the parties Board Member Howard Jenkins, Jr., then nominated for reappointment, but not yet confirmed by the Senate, was invited to sit with the Board during oral argument.

[5]Finding merit in certain of the General Counsel's exceptions, we hereby correct the following errors in the Administrative Law Judge's Decision:

(1) The Administrative Law Judge stated that the container stuffing done by California Cartage consisted of less than container loads. The record discloses, however, that a great amount of the stuffing done by this firm consists of "straight" loads, which are large lots of cargo on a single bill of lading which completely fill one or more containers.

(2) The Administrative Law Judge apparently inadvertently held that if the agreement involved herein was tactically calculated to satisfy objectives elsewhere, the Charging Parties are neutral bystanders; i.e., the secondary employers. In fact,

The facts in these consolidated cases are not in dispute, Respondent PMA and Respondent Unions have a long history of collective bargaining covering longshoremen and marine clerks. Since 1961 these employees have been represented under the ILWU-PMA Pacific Coast Longshore and Clerk's Agreement or Document (PCLCA or PCLCD). In 1960, the parties negotiated and adopted a Modernization and Mechanization Agreement. This Agreement recognized for the first time that technological advances had seriously diminished available work for longshoremen and attempted to accommodate the legitimate interests and needs of both parties in the Pacific coast shipping industry. Under the Agreement PMA members gained the right to use new equipment to increase productivity and improve methods for handling cargo. In the future, nonlongshoremen delivering merchandise to the dock would not be required to place the cargo on the "skin of the dock" to be reloaded by longshoremen on other pallets for loading aboard ship. It was agreed that the Union would divest itself of this type of work and longshoremen would load truckers' pallets with the merchandise directly on the ship. Cargo could be unitized in one way or another—boxed, crated, banded, glued, or palletized in large or small containers. The idea was to move the cargo in the safest and most efficient

he should have stated that under those circumstances PMA and its member companies would be the neutral bystanders.

(3) Further corrections have been made to the Conclusions of Law, the Order, and the Appendixes to reflect errors pointed out by certain exceptions of the General Counsel, including the deletion of Locals 10 and 34 of the ILWU from findings or orders concerning the 8(b)(4) violations.

manner on or off the ship. To accomplish this objective new and improved winches and cranes became standard equipment. Moreover, at this time the process of containerization, the method whereby bulk cargo is placed in large containers, 8 by 8 by 20 or 40 feet or larger, was in its infancy and growing. Matson Navigation Company, a member of PMA had already converted one of its freighters[6] in 1959 to carry a deckload of containers in addition to conventional cargo in its hold. While the record shows that longshoremen exclusively have always performed the actual work of loading and unloading merchandise, however contained, on and off ships, it is also clear that preparing cargo for shipment in various types of containers is work that had been performed over the years by teamsters and other employees as well as longshoremen.

In return for the Union's relinquishment of make-work practices, it was further agreed in the 1960 Agreement that the operation of all new equipment on the docks would be performed by longshoremen and, in addition, members of PMA would establish a mechanization fund of $29 million, subsequently augmented by another $34.5 million, to be used in support of longshoremen's pension, retirement, and unemployment.

During the early part of the 1960's, this compromise apparently worked to the satisfaction of the ILWU and PMA. At the same time, however, and with increasing acceleration, shipping companies

[6]Referred to in the record as *Hawaiian Citizen* or *Hawaiian Merchant*.

began to adopt, some exclusively, the new method of transporting cargo known as "containerization." The use of boxes or bundles on or off pallets became a less desirable and uneconomical method of handling cargo in the new technology. Following the lead of Matson, other steamship companies converted their vessels to carry containers or constructed new ships solely for that purpose. Obviously, the larger and more self-contained the load, the less work for longshoremen to load or unload the ship and, as a parallel, the less time in port for the ship, with substantial savings to the shipping industry.

As indicated above, the modern container is a large enclosure 20 feet or more in length designed to fit into the slot of a containerized ship, or on the chassis of a truck, or piggyback on a train. The development of this method of carrying freight gave rise to the establishment of container freight stations. From the beginning shipping companies, members of PMA and owners of the containers, have contracted with trucking firms to stuff and unstuff some of these containers with merchandise from shippers or to consignees. These trucking firms, such as California Cartage and Pacific Motor Trucking, the Charging Parties in several of these cases, employ drivers and warehousemen represented by the Teamsters.

As the decade of the 1960's neared its end, the ILWU was concerned at the loss of longshore work to an extent not contemplated in the 1960 Agreement, and therefore sought and obtained from PMA the so-called Container Freight Station Supplements to

their collective-bargaining contract. These Supplements were executed on January 5, 1970, and February 10, 1972, and provided, in effect, that all stuffing and unstuffing of containers to be loaded or unloaded from ships docking in Pacific coast ports, except for shippers' loads and door-to-door deliveries, was work to be performed by ILWU members. The intent of the 1970 Supplement was to bring container work "to the dock or to areas adjacent to the dock on or before June 30, 1971." This would require shipping companies to cease subcontracting container stuffing work to employers who did not employ ILWU members and to establish, if necessary, their own container freight stations on or adjacent to the docks within the work jurisdiction of the ILWU.

At issue in these cases is, first, the legality under Section 8(e) of the above contractual provisions and, second, the legality under Sections 8(b)(4)(i) and (ii)(B) of conduct by Respondent International and its Locals 13 and 63 in taking action to implement these provisions, as set forth in detail in the Administrative Law Judge's Decision.

The Board has considered Respondents' defense that the work of stuffing and unstuffing modern containers is work that falls into the category of unit work traditionally performed by members of ILWU within the multiemployer PMA unit and that their attempt to preserve or reclaim this work for ILWU-represented employees is primary, lawful activity under the Supreme Court's decision in *National Woodwork Manufacturers v. N.L.R.B.*[7] Although the

[7] 386 U.S. 612 (1967).

loss of work on the docks, whether due to the use of large containers or other technological improvements, is certainly a matter of legitimate concern to the ILWU, we cannot agree with its legal position in these cases.

Initially, it is clear from the language of the Supplements that the ILWU's claim to container stuffing work is not limited to work generated by members of PMA, but extends broadly to all containers entering of leaving Pacific coast docks, whether or not the owners of the containers are members of PMA and statutory employers of employees within the longshore unit represented by ILWU. Obviously, as to those shipping companies, nonmembers of PMA using the Pacific coast docks to load or unload their containers, the statute does not permit a restrictive contract or a refusal to handle their containers to put pressure on them to cease doing business with trucking, cartage, or other companies which do not employ ILWU members.

With respect to Respondents' reliance upon *National Woodwork, supra,* that rule cannot be applied so broadly as to encompass all efforts by unions to enlarge the work opportunities for members of a bargaining unit adversely affected by technological advances. In that case the Court set forth its views in three opinions, of which Justice Harlan's concurring opinion established a majority of five to four. The main opinion cautioned that the test in determining the legality of a restrictive clause was not "simple"

and must be made with full concern for "all the surrounding circumstances." Such circumstances were defined by the Court as including "the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry.[8] Justice Harlan was careful to note that the case before him did not involve a restrictive contract or boycott to acquire for union members "work that had not previously been theirs."[9] Rather, it was a question of union carpenters seeking to continue their traditional practice of mortising, routing, and beveling blank doors on the jobsite before installation. In the context of these narrow facts, he held that Congress had not forbidden this method of meeting the economic problem arising from a changing technology. Four Justices, dissenting, held that the union's boycott of the prefitted doors fell clearly within "the express terms of the federal labor law."[10]

In *Fibreboard Paper Products Corp. v. N.L.R.B.,*[11] upon which Respondents further rely, the Court restricted its holding of a violation of Section 8(a)(5) in a question involving subcontracting to the facts of that case; i.e., "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same under similar conditions of employment."[12]

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[8]386 U.S. at 644, fn. 38.
[9]*Id.* at 648.
[10]*Id.* at 650.
[11]379 U.S. 203 (1964).
[12]*Id.* at 215.

In the instant case the record shows that the stuffing and unstuffing of containers, whether large or small, modern or pre-World War II, is work that has been performed both by longshoremen and by other employees, including teamsters employed by the Charging Parties. It may well be, as the ILWU contends, that the modern container is, in effect, part of a ship. But it is also true that the same container is part of a truck or perhaps a train. The traditional work of the ILWU has been to load and unload ships. To a large extent, the make-work rights claimed by longshoremen with respect to cargo placed on the dock were effectively bargained away in 1960. The contract made between the concerned employers and the ILWU in that year is of historic significance because it represented a new approach to the serious problem of employee displacement as a result of technological changes. In good-faith collective bargaining the parties recognized each other's vital interests in a bargain which accommodated themselves and the public. Instead of insisting that technological changes must be restricted, the Union agreed to progress which was, in any event, inevitable. The Companies, on the other hand, assumed responsibility for the economic consequences to union members in the loss of employment. If, indeed, as Respondents insist, longshore work has fallen to an unacceptable level, the way should be clear to the parties to resolve their differences without renewing old wars and illegally affecting the rights of other employers and their employees.

Respondents call to the Board's attention the fact that their Container Freight Station Supplements relate to only a small portion of the work of stuffing and unstuffing containers since shippers' loads, representing 85 percent of that work, are not included. The work of stuffing containers, however, does not change its essential character because it is performed by shippers rather than trucking company employees. Indeed, the evidence indicates that a substantial portion of the work of California Cartage employees involves the stuffing of straight or full loads into containers as well as less than container loads. While the ILWU does not now seek all container work, the logic of its position is that it is legally entitled to all such work without regard to the identity of the competing employees. Obviously, a boycott to enforce a claim to stuff shippers' loads and door-to-door deliveries would have an enormous impact on the shipping industry. This circumstance, among others set forth above, clearly distinguishes this case from *National Woodwork, supra,* it is, moreover, a circumstance which, in accordance with the Court's caveat in that case, warrants the Board's full concern in determining the validity of the ILWU's claim of work preservation.

In reaching our decision in this case we find it unnecessary to pass upon or adopt the Administrative Law Judge's opinion that both secondary and primary employers may coexist in the same multiemployer bargaining unit. We reject the General Counsel's argument that members of PMA who do not directly

employ longshoremen are neutral, secondary employers entitled to the protection of Section 8(b)(4) of the Act.

The ILWU's unit of longshoremen was found appropriate by the Board in 1938.[13] At that time the Board recognized and accepted the fact that not all members of the Waterfront Associations, predecessors of PMA, directly employed longshoremen. Nevertheless, the Board was cognizant then, as it is now, that employers in the shipping industry on the Pacific coast have a direct and vital interest in the terms and conditions of employment for longshoremen. The history of labor relations in that industry has been fraught with extraordinary problems, which have extended beyond the customary employer-employee relationship. As the Board pointed out in 1938, the statute defines the term "employer" to include any person acting as an agent for an employer "directly or indirectly." All members of PMA have given that agency the authority to act as their agent and PMA, in turn, is clearly the agent of employers employing longshoremen. In this particular industry the community of interest of the participating employers is unmistakable. We need not, however, and do not go beyond the facts of this case and this industry in holding that all members of PMA are, with respect to the ILWU, primary employers for the purposes of collective bargaining in the established unit of longshoremen and marine clerks.

[13] *Shipowners' Association of The Pacific Coast*, 7 NLRB 1002 (1938).

On the basis of the foregoing, we find that by entering into the 1970 and 1972 Container Freight Station Supplements, Respondent PMA and Respondent Unions violated Section 8(e) of the Act.

Further, by their inducement and encouragement to the employees of PMA not to handle containers stuffed by non-ILWU labor, and their refusal to handle cargo in an attempt to implement the Container Freight Station Supplement, Respondents ILWU and its Locals 13 and 63 violated Section 8(b)(4)(i) and (ii)(B) of the Act.

Amended Conclusions of Law

Substitute the following for the Administrative Law Judge's Conclusion of Law 4:

"4. By inducing and encouraging individuals employed by PMA and its member companies to engage in work stoppages or refusals to perform services in the course of their employment, and by threatening, coercing, and restraining PMA and its member companies with an object of forcing or requiring them to cease doing business with California Cartage, Respondent ILWU and its Locals 13 and 63 have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act."

The Remedy

Having found Respondent Unions and Respondent PMA to have engaged in certain unfair labor practices in violation of Section 8(e), and Respondents ILWU and its Locals 13 and 63 to have engaged in

unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, we shall order that each Respondent cease and desist from the proscribed conduct and take certain affirmative action which we find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. Respondent Unions, International Longshoremen's and Warehousemen's Union and Locals 13 and 63 of the International Longshoremen's and Warehousemen's Union, their officers, agents, and representatives, shall:

(a) Cease and desist from:

(1) Entering into, maintaining, giving effect to, or attempting to implement in any way the Container Freight Station Supplements to the master agreement known as the Pacific Coast Longshore and Clerks' Agreement between the PMA and the ILWU to the extent and in the manner said agreement has been found to be unlawful herein, or any other contract or agreement, express or implied, whereby PMA, on behalf of its member companies, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

(2) Threatening, coercing, or restraining PMA or any of its member companies, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with California Cartage, or any other person.

(3) Inducing and encouraging any individual employed by PMA or its member companies to engage in work stoppages or a refusal to perform services in the course of his employment, where an object thereof is to force or require such persons to cease doing business with California Cartage, or any other person.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify member of the International Longshoremen's and Warehousemen's Union that Respondent Unions have no objections to loading or unloading containers that have been stuffed, or are to be unstuffed, by employees of California Cartage, PMT, International Cargo, and Richmond Export, or any other employer utilizing non-ILWU members in the performance of these duties.

(2) Notify all members of the International Longshoremen's and Warehousemen's Union that any previous instructions, requests, or appeals which Respondent Unions may have made against loading or unloading containers not stuffed, or to be unstuffed, by other than ILWU members have been withdrawn and are to have no force or effect.

(3) Notify all members of the International Longshoremen's and Warehousemen's Union that any and all of the paragraphs contained in the Container Freight Station Supplements negotiated by and between PMA and ILWU which limit, restrain, re-

strict, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(4) Post at their business offices, meeting halls, and all dispatch halls copies of the attached notice marked "Appendix A."[14] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by a representative of Respondent International Union, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Unions to insure that said notices are not altered, defaced, or covered by any other material.

(5) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Unions have taken to comply herewith.

2. Respondent Unions, International Longshoremen's and Warehousemen's Union and Locals 10 and 34, of the International Longshoremen's and Warehousemen's Union, their officers, agents, and representatives, shall:

[14]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(a) Cease and desist from entering into, maintaining, giving effect to, or attempting to implement in any way the Container Freight Station Supplements to the master agreement known as the Pacific Coast Longshore and Clerks' Agreement between PMA and the ILWU to the extent and in the manner said agreement has been found to be unlawful herein, or any other contract or agreement, express or implied, whereby PMA, on behalf of its member companies, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify all members of the International Longshoremen's and Warehousemen's Union that any and all of the paragraphs contained in the Container Freight Station Supplements negotiated by and between PMA and ILMU which limit, restrain, restrict, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(2) Post at their business offices, meeting halls, and all dispatch halls copies of the attached notice marked "Appendix B."[15] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by a representative of Re-

[15]See fn. 14.

spondent International Union, shall be posted by Respondents immediately upon receipt thereof, and be maintained by then for 60 consecutive days thereafter, in conspicuous places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Unions to insure that said notices are not altered, defaced, or covered by any other material.

(3) Furnish said Regional Director with signed copies of the aforesaid notice for posting by California Cartage Company, Inc., Pacific Motor Trucking Company, International Cargo Services, Inc., and Richmond Export Services, Inc., or such of said employers as may be willing, at all places where notices to their respective employees are customarily posted.

(4) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Unions have taken to comply herewith.

3. Pacific Maritime Association, San Francisco, California, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from entering into, maintaining, enforcing, or giving effect to any or all of those sections of the Container Freight Station Supplements negotiated by and between PMA and ILWU which restrict, restrain, limit, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify all company members of the Pacific Maritime Association that any previous instructions, requests, or appeals which Respondent PMA may have made against loading or unloading containers that have been stuffed, or are to be unstuffed, by non-ILWU personnel are to be withdrawn and to have no force or effect.

(2) Notify all company members of Pacific Maritime Association that any and all provisions of the Container Freight Station Supplements which have been negotiated between the PMA and ILWU which restrain, restrict, limit, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(3) Mail to each of their member companies and post at their main office in San Francisco and at each area office copies of the attached notice marked "Appendix C."[16] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent PMA's representative, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to member companies are customarily posted. Reasonable steps shall be taken

[16]See fn. 14.

by Respondent PMA to insure that said notices are not altered, defaced, or covered by any other material.

(4) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent PMA has taken to comply herewith.

Dated, Washington, D.C.,
February 11, 1974.

Edward B. Miller, Chairman
John H. Fanning, Member
(Seal) Howard Jenkins, Jr., Member
Ralph E. Kennedy, Member
John A. Penello, Member
National Labor Relations Board

Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-684

PACIFIC MARITIME ASSOCIATION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and its LOCALS 13, 63, 10 and 34, *Petitioners,*

VS.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Cases	Pages
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Come now petitioners and, pursuant to this Court's Rule 24(5), hereby file this supplemental brief to the petition for certiorari filed herein on November 10, 1975, for the purpose of calling to the Court's attention the following new case not available to petitioners at the time of the filing of the petition: to wit, the decision of Merhige, D.J. *(one of the members of the panel of the Court of Appeals in the instant case)* in *Humphrey v. International Longshoremen's Association,* ..... F.Supp. ....., 90 LRRM 2838 (E.D.Va.,

1975). Although Judge Merhige's decision is dated September 30, 1975, it did not come to counsels' attention until it was published in the Labor Relations Reporter of November 3, 1975, copy of which was received on the West Coast on November 10, 1975.

Judge Merhige's decision, a copy of which is attached hereto as an appendix to this supplemental brief, is utterly inconsistent with the Board Order in this case and further illustrates the need for review here.

The cited case involved an application by the Board's Regional Director, under Section 10(1) of the Labor Management Relations Act of 1947, as amended, 29 USC 160(1), for an injunction against the enforcement of a collective bargaining contract under which East Coast longshoremen at Hampton Roads, Virginia had the right to stuff and strip (unstuff) containers or to collect fines for containers not stuffed or stripped by ILA labor. Although a 10(1) injunction is to be granted merely upon a finding that *the Regional Director has cause to believe* that the Act has been violated (a far less rigorous test than that required to enforce a Board order), Judge Merhige refused to issue the injunction. He did so because he found that the contract in question was a work preservation agreement within the scope of *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967). The factors that led to this conclusion are precisely the same as those specified in the petition in this case.

Humphrey v. I.L.A.	**Instant Case**
1. It has long been held that work preservation provisions are valid and enforceable parts of labor-management collective-bargaining agreements, even if those provisions operate to deprive other interested labor of the opportunity to perform the work so protected. National Woodwork Mfrs. Assoc. v. N.L.R.B., 386 U.S. 612, 64 LRRM 2801 (1967); International Container Transport Corp. v. NYSA, Inc., 426 F.2d 884, 74 LRRM 2530 (2d Cir. 1970). (App. x.)	1. One of the main premises underlying the decision below was the Board's obvious concern that the CFSS might have an adverse effect upon other persons. The Board explicitly stated that since PMA and ILWU had early on been able to agree to a solution that eliminated restrictive work practices, they ought to be able to reach a similar agreement now without "affecting the rights of other employers and their employees" (App. xii.) But the application of such a standard, "however severe" the impact on others may be, is directly contrary to the holding of *National Woodwork* (and to the holdings of the Courts of Appeals for at least three other circuits . . .) (Pet. for Cert. 22-23.)
2. For several decades, employees represented by the I.L.A. have performed essentially all the labor required in loading and unloading cargo at piers and waterfront terminals in the Port of Hampton Roads. This work included . . . the preparation of cargo for loading, the sorting of cargo according to consignees and types, and the delivery of cargo to trucks on other inland carriers, as well as the physical loading and unloading of cargo ships. (App. xi.)	2. This work of assembling the cargo on the docks and fitting it in the form in which it was to be loaded aboard the vessel and of disassembling it when it was unloaded and of moving it across the docks has historically been exclusively performed by the longshoremen. This work included the placing of cargo into, and taking it out of, the various types of boxes that were used before the modern container came into being. In his Brief to the Court of Appeals (pages 4-5, 9), General Counsel for the Board conceded that this was traditional and historical work of longshoremen. (Pet. for Cert. 9-10.) • • • In addition to the exclusive history of longshoremen performing piece-by-piece cargo handling on the dock (work for which the container has become a substitute), longshoremen also have traditionally and historically performed stuffing and unstuffing work on various kinds of containers up to and including modern containers. (Pet. for Cert. 14.)

3. Containerization, the handling of cargo in large enclosed boxes, first appeared in 1965 in the Port of Hampton Roads. It threatened to drastically reduce the number of man-hours required to handle cargo, and thereby diminish substantially the work available for longshoremen. As a result, containerization became a major subject of collective bargaining, and the disputes surrounding the procedure's effect on the shipping industry culminated in a 56 day strike in 1968. I.L.A. and Hampton Roads settled their differences by way of the Containerization Clause and "Rules on Containers," first effective on October 1, 1968. Two subsequent contracts have been negotiated that include the Rules—one effective November 14, 1971 to September 30, 1974, and one effective on October 1, 1974 to September 30, 1977. (App. xi.)

Instant Case

In his Brief to the Court of Appeals (pages 10-11), General Counsel for the Board conceded that longshoremen did and do perform stuffing of modern containers whenever that was and is done at the docks. (*Ibid.*)

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3. The containerization of the industry continued with rapidity throughout the decade and by 1968 it became a veritable explosion. By 1969, 20% of all cargo handled across West Coast docks was containerized and by 1970 the figure had risen to over 25% (General Counsel's Exhibit 2P before the National Labor Relations Board). The effect of these developments on longshore jobs opportunities was dramatic. Between 1969 and 1970 the total hours worked by West Coast longshoremen had dropped by some 5,000,000 from over 31,000,000 in 1969 to 26,000,000 by 1970 (General Counsel's Exhibit 2Q)—a loss of almost 20%. (Pet. for Cert. 13.)

• • •

. . . the loss of work by longshoremen had reached such serious proportions that, when the issue was not initially resolved, the longshoremen went on strike over it. *Pacific Maritime Association v. International Longshoremen's and Warehousemen's Union*, 454 F.2d 262 (9 Cir., 1971). This strike, in the middle of the contract term, was the first strike since industrial peace had been reestablished on the West Coast waterfront in the 1950's (*supra*, p. 11) and was the direct result of the economic pressure being felt by the rank and file longshoremen as a result of the impact of containerization on his job opportunities. (Pet. for Cert. 15-16.)

• • •

In these circumstances and to meet this threat to the work force, PMA and ILWU, in collective bargaining, negotiated the CFSS.

Instant Case

The Board put it succinctly:

"As the decade of the 1960's neared its end, the ILWU was concerned at the loss of longshore work to an extent not contemplated in the 1960 Agreement, and therefore sought and obtained from PMA the so-called Container Freight Station Supplements to their collective-bargaining contract. These Supplements were executed on January 5, 1970, and February 10, 1972, and provided, in effect, that all stuffing and unstuffing of containers to be loaded or unloaded from ships docking in Pacific Coast ports, except for shippers' loads and door-to-door deliveries, was work to be performed by ILWU members. The intent of the 1970 Supplement was to bring container work 'to the dock or to areas adjacent to the dock on or before June 30, 1971'." (App. viii-ix.) (Pet. for Cert. 16.)

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4. There was . . . a lapse of eight years in which the longshoremen did not have the right, under the ten effective contracts, to exclusively strip full shipment loads. This lapse was, the Court is satisfied, bottomed on a lack of comprehension of what was, during much of this period, a new concept of cargo transportation. Appreciable container traffic wasn't introduced in this area until the early 70's.

• • •

The newness of the concept of containerization, coupled with the adjustment time needed by all the industries affected by the process, must be expected to create temporary maladjustments in the legal agreements of the affected parties. (App. xii-xiii.)

4. During the early 1960's, the mechanization agreement seemed to have solved the problems created by the early changes in technology. However, at that time containerization as it is now practiced in the longshore industry was, unbeknownst to the parties, still in its infancy and, as the Board noted, developments throughout the next decade changed the picture radically:

". . . with increasing acceleration, shipping companies began to adopt, some exclusively, the new method of transporting cargo known as 'containerization'. The use of boxes or bundles on or off pallets became a less desirable and uneconomical method of handling cargo in the new technology . . . [S]teamship companies converted their vessels to

carry containers or constructed new ships solely for that purpose. (Pet. for Cert. 12.)

---

5. Supplemental but not determinative of the Court's independent conclusion as to this factual issue is the language contained in the parties' agreement of October 1, 1974 to the effect that *"the provisions are intended to protect and preserve the work jurisdiction of the longshoremen and all other I.L.A. crafts which was performed at deepsea waterfront facilities. The rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea I.L.A. labor."* (App. xiii.)

5. The 1972 CFSS spelled out the objective:

> "... to *protect and preserve the established work of employees* covered by the PMA/ILWU Pacific Coast Longshoremen's & Clerks' Agreement and this CFS Supplement at *docks or areas adjacent thereto."* (General Counsel's Exhibit 3, Section 1.5; emphasis supplied.) (Pet. for Cert. 17.)

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6. Re-acquisition and preservation of traditional work is the purpose of the respondent union's actions, and this is both appropriate and legal. National Woodwork Mfrs. Asso. v. N.L.R.B. 386 U.S. 612, 64 LRRM 2801 (1967); see American Boiler Mfrs. Assoc. v. N.L.R.B., 404 F.2d 547, 69 LRRM 2851 (1968). (App. xiv.)

6. This is the heart of petitioner's argument:

> Under the "work recapture doctrine", an objective of re-acquiring work that has eroded from the bargaining unit is a primary and lawful objective. (Pet. for Cert. 27.)
>
> • • •
>
> Under the "fairly claimable work doctrine", an objective of performing work which is closely allied to traditional work is a primary and lawful objective. (Pet. for Cert. 31.)

American Boiler Manufacturers was cited throughout in all the briefs and arguments below as was *National Woodwork*. Yet the Board never once referred to *American Boiler Manufacturers* in its Decision and Order.

It is clear from the foregoing that Judge Merhige has written an opinion totally inconsistent with the Board's Decision and Order in the instant case. Strangely, the Panel of the Court of Appeals upon

which he sat did not write an opinion to explain its incomprehensible affirmance of the Board. Petitioners are entitled to know why their case is treated differently from other cases.

Judge Merhige's opinion underscores the necessity for granting the petition for yet an additional reason. If the decision below is permitted to stand there will be different legal standards for the performance of container work on the East Coast and on the West Coast of the United States.[1] The West Coast longshoremen will be disadvantaged precisely because the ILWU, unlike the ILA, cooperated with the employers in accommodating to technological change.[2] Ironically it was this very cooperation which gave the employers the incentive to containerize their cargo operations.[3]

---

[1]Administrative Law Judge Ordman (who was formerly General Counsel to the Board) has also sustained as a valid work preservation clause the ILA contract in the New York port area which is substantially similar to the ILA's Hampton Roads agreement and to the ILWU's CFSS. (*International Longshoremen's Association (Consolidated Express Inc.)*, NLRB Case No. 22-CC-541 [1974].)

International Container Transport Corporation v. New York Shipping Association, 426 F.2d 884 (2 Cir. 1970) held that the ILA's New York agreement did not violate the Sherman Anti-Trust Act.

[2]In explaining the difference between the result in the instant case and his decision in *Consolidated Express, supra*, Judge Ordman relied heavily on Professor Philip Ross' analysis:

> "All management attempts to make deals analogous to that on the West Coast were summarily rebuffed and the ILA retained . . . both its hostility to technological change and its freedom of action." (Ross, *Waterfront Labor Response To Technological Change: A Tale Of Two Unions*, Labor Law Journal, July 1970, p. 397 at 417).

[3]The Southern California Area Manager of PMA testified without contradiction:

> "I don't think there is any doubt but that it [the M &M Agreement] was a tremendous incentive to increase the use of special methods of cargo handling and containerization

In the light of the results ILA achieved by its resistance to technological change, the suggestion made in the petition, that the decision below will discourage unions from cooperating with employers who wish to introduce new technological methods of performing work takes on added significance and emphasizes the importance of this Court's reviewing the manner in which the *National Woodwork* rationale was (or was not) applied in this case.

Dated, November 21, 1975.

Respectfully submitted,
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was certainly by far the most important of these because it made it economically feasible to introduce these without extremely high penalties in the way of employment of unnecessary men." (Tr. 1157)

(Appendix Follows)

APPENDIX

Appendix

United States District Court
Eastern District of Virginia

No. 75-441-N

William C. Humphrey, Regional Director, etc.,

vs.

International Longshoremen's Association, AFL-CIO, et al.

September 30, 1975

MERHIGE, District Judge:—

William C. Humphrey, Regional Director of Region 5 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, brings this petition for a temporary injunction against respondents, International Longshoremen's Association, AFL-CIO, International Longshoremen's Association, AFL-CIO, Hampton Roads District Council; International Longshoremen's Association, AFL-CIO, Local 846; International Longshoremen's Association, AFL-CIO, Local 862; International Longshoremen's Association, AFL-CIO, Local 970; International Longshoremen's Association, AFL-CIO, Local 1248; International Longshoremen's Association, AFL-CIO, Local 1624; International Longshoremen's Association, AFL-CIO, Local 1783; International

Longshoremen's Association, AFL-CIO, Local 1784 (hereinafter collectively the I.L.A.), and Hampton Roads Shipping Association (hereinafter Hampton Roads), for violations of §§ 8(b)(4)(ii) and 8(e) of the National Labor Relations Act (hereinafter Act). Jurisdiction is conferred on this Court by Section 10(1) of the Act 29 U.S.C. § 160(1) (1970).

The evidence, both stipulated and controverted, establishes that on May 7 and 12, 1975, Associated Transport, Inc. (hereinafter Associated), a New York corporation, filed a charge and amended charge against all the I.L.A. respondents with the National Labor Relations Board alleging that I.L.A. has engaged in, and are engaging in, unfair labor practices within the meaning of § 8(b)(4)(ii) of the Act, and that respondents I.L.A. and Hampton Roads have engaged in and are engaging in unfair labor practices within the meaning of § 8(e) of the Act. On May 12, 1975 Houff Transfer, Inc. (hereinafter Houff), a Virginia corporation, filed similar charges with the Board, and on May 13, 1975 Tidewater Motor Truck Association (hereinafter Tidewater), an employer association of 28 employer members operating trucking businesses in the Hampton Roads, Virginia area, including but not limited to Houff and Associated, also lodged similar charges with the Board against the respondents. At all times material to this petition, Associated and Houff shipped goods and materials valued in excess of $50,000 in interstate commerce from ports in this District to points located outside the State of Virginia.

Respondent I.L.A. is a group of unincorporated associations that deal with employers on behalf of employees on matters of employee grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of work. It is stipulated that I.L.A. is a group of "labor organizations" within the meaning of §§ 2(5), 8(b), and 10(1) of the Act. At all times material to this petition, respondents I.L.A. Local 846 and 862 have maintained their principal offices in Newport News, Virginia, and I.L.A. Local 970, 1248, 1624, and 1783 have maintained their principal offices at Norfolk, Virginia. I.L.A. Local 1784 has maintained its principal office at Hampton, Virginia. Respondents I.L.A. International Council and Hampton Roads District Council maintain offices in Norfolk, Virginia, and at all times material to this petition have transacted business in Norfolk, Virginia. Respondent Hampton Roads is an organization of various steamship lines that bargains collectively on behalf of its member employers with labor organizations including but not limited to I.L.A., concerning wages, hours, working conditions, and other conditions of employment. Among the employer members of respondent Hampton Roads is United States Lines, a steamship line shipping, at all times material to this petition, cargo by ocean-going vessels in interstate and foreign commerce into various United States ports, including Hampton Roads, Virginia. This cargo often consists of goods loaded in "containers," uniformly sized metal boxes owned by United States Lines.

It is stipulated that I.L.A. members, at all times material to this petition, perform work at the piers of Newport News, Norfolk and Hampton Roads, Virginia unloading U.S. Lines' containers from its steamships pursuant to collective bargaining agreements negotiated by and between I.L.A. and CONASA, (the Council of North American Shipping Associations) which represents several employer shipping associations, including but not limited to Hampton Roads Shipping Association. At no time material herein have Associated, Houff, or any employer-members of Tidewater been a member of Hampton Roads Association, a party to any of the Hampton Roads-I.L.A. agreements, or had any employee represented by, or a member of, I.L.A.

On September 24, 1974 and on October 1, 1974, four fully loaded containers from the S.S. American Legion and the S.S. American Aquarius, respectively, were discharged at Norfolk, Virginia, picked up by Associated on each of said dates for transportation and delivery to consignees in an area more than fifty miles from the port. Each of these containers contained cargo to be delivered solely to one consignee. In each instance the Associated driver hauled the containers to Associated's terminal, less than fifty miles from the port, where they were unloaded ("stripped") and the cargo from each container reloaded into Associated's truck trailers. On October 5, 1975 Mr. Queen of U.S. Lines and Mr. Merritt of I.L.A. arrived at the terminal and inspected the eight containers, finding that the seal had been broken on each and the

containers stripped. I.L.A. subsequently charged U.S. Lines with a violation of Rule 1(a)(3) and Rule 2(B)(2) of the October 1, 1974-September 30, 1977 CONASA-I.L.A. Rules on Containers, a collective-bargaining agreement entered into by and between the employer-members of Hampton Roads and I.L.A. The pertinent provisions are as follows:

> Definitions: * * * (b) Discharging a Container —means the act of removing cargo from a container.
>
> * * *
>
> (d) Discharging Containers from a vessel—means the act of removing containers from a vessel.
>
> (e) Waterfront facility—means a pier or dock where vessels are normally worked including a container compound operated by a carrier or direct employer.
>
> * * *
>
> (g) Qualified Consignee—means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.
>
> (h) Consolidated Container Load—means a container loal of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.
>
> Rule 1—Containers to Loaded or Discharged by Deepsea I.L.A. Labor.
>
> (a) Cargo in containers referred to below shall be loaded into or discharged out of containers

only at a waterfront facility by deepsea I.L.A. labor.

(1) Containers owned, leased or used by carriers (including containers on wheels and trailers), hereinafter "containers," which contain consolidated container loads, which come from or go to any point within a geographic area of any CONASA port described by a 50-mile circle with its radius extending out from the center of each port, (hereinafter "geographic area") or

(2) . . .

(3) Containers designated for a single consignee from which the cargo is discharged (deconsolidation) by other than its own employees within the "geographic area" and which is not warehoused in accordance with Rule 2(B).

Rule 2—Containers Not to be Loaded or Discharged by I.L.A. Labor:

* * *

B. Import Cargo:

(1) . . .

(2) Containers discharged at a qualified consignee's facility by its own employees.

In accordance with Rule 9 of the contract, a joint I.L.A.-Hampton Roads grievance committee, the "CONASA-I.L.A. Container Committee," met on October 31, 1974, heard the charges and levied fines of $8,000 against U.S. Lines ($1,000 for each container improperly stripped). U.S. Lines paid the fine, and by letter of November 7, 1974, requested that Assoeiated indemnify it for its payment of the penalty. Associated refused, asserting that it was not a party

to Hampton Roads-I.L.A. agreements, and that it should not be bound by fines negotiated in accordance with such agreements. As a result of Associated's refusal, U.S. Lines formally terminated, on March 20, 1975, the Asscciated-U.S. Lines Equipment Interchange Agreement. The Interchange Agreement enabled Associated to transport and otherwise handle containers owned by U.S. Lines so as to transport the cargo of the container to the intended consignees. The termination of the agreement effectively precluded Associated from further handling any U.S. Lines container cargo, despite requests from shipping brokers and consignees that Associated do so. The evidence indicates that Associated lost a substantial amount of container business.

The above facts are substantially identical with those involving the cancellation by U.S. Lines of the Equipment Interchange Agreements with Houff and other employer-members of Tidewater.

In March 1975, in accordance with Rule 8 of the container rules, I.L.A. notified CONASA and respondent Hampton Roads of its intent to renegotiate the container rule. The parties were unable to reach an agreement and I.L.A., on April 28, 1975, suspended what is referred to as the 30-day warehouse clause. That clause is designated Rule 2B(4).

> Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions.
>
> 1. The container cargo is warehoused at a bona fide public warehouse,

2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days, and

3. The cargo being warehoused (a) in the normal course of business of the qualified consignee; (b) the title to such goods has not been transferred from the qualified consignee to another.

The rules on containers, including the 30-day warehouse clause, were reinstated by agreement between I.L.A. and Hampton Roads on May 30, 1975.

It is argued by the petitioners that the grievance procedure operates to effect a "secondary boycott" against their business of stripping and transporting the goods from fully loaded and unconsolidated "containers". The petitioners seek immediate injunctive relief to prohibit I.L.A. from further fining employer-members of Hampton Roads for acts similar to those taken by Associated in the instant case, and to prohibit I.L.A. and Hampton Roads from further interpreting and/or enforcing those provisions of the collective-bargaining agreement that cause fines to be levied on employer-members of Hampton Roads for acts similar to those taken by Associated in the present case.

The Court, to grant the relief sought, must conclude that there is reasonable cause to believe that the pending charges against the respondent for unfair labor practices are well taken, and that such relief is just and proper under the circumstances of this case. 29 U.S.C. § 160(1) (1970) states in part, in reference to the granting of a temporary injunction, that the

Court decree "as it deems just and proper." See Call Carl, Inc. v. B.P. Oil Corp., No. 74-1819 (4th Cir., April 1975); Leeward v. Crown Central Petroleum, No. 75-1042 (4th Cir., June 19, 1975); Consolidation Coal Co. v. Disabled Miners of Southwest Virginia, 442 F.2d 1261, 77 LRRM 2955 (4th Cir. 1971); The West Virginia Highland Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Johnson v. J. P. Stevens & Co., 234 F.Supp. 244, 249, 57 LRRM 2594 (E.D. N.C. 1964), aff'd., 341 F.2d 891, 58 LRRM 2457 (4th Cir. 1965) Penello v. International Longshoremen's Assoc., Local 1248, 78 LRRM 2009, No. 71-280-N (E.D. Va. 1971).

The Supreme Court has held that congressional grants of injunctive power to the federal courts in specified areas do not operate to limit the flexibility of the courts' traditional equity powers with respect to the exercise of those grants unless such restrictions are expressed in the legislation. Hecht v. Bowles, 321 U.S. 321 (1944). Finding no express limits on this Court's equitable powers in the National Labor Relations Act, this Court in determining the instant issue treats enforcement proceedings under the Act consistent with its traditional equity practices, *conditioned* by the necessities of public interest which Congress sought to protect in enacting the National Labor Relations Act. See Consolidation Coal Co. v. Disabled Miners of S.W. Va., supra, 442 F.2d 1261, 77 LRRM 2955 (4th Cir. 1971); The West Virginia Highlands Conservancy v. Island Creek Coal Co., supra, 441 F.2d 232 (4th Cir. 1971). There is admittedly authority to the contra. See Schauffer v. Local

1291, International Longshoremen's Assoc., 292 F.2d 182, 48 LRRM 2434 (3d Cir. 1961); Douds v. International Longshoremen's Assoc., 242 F.2d 808, 811-812, 39 LRRM 2682 (2d Cir. 1957).

The Court finds from this record that the contract of October 1, 1974 specifically prohibits U.S. Lines from permitting its containers that are fully loaded and designated for a single consignee to be stripped by anyone other than the employees of that consignee within the "geographic area" referred to in the contract—fifty miles. Hence the actions of the Container Grievance Committee in fining U.S. Lines for the stripping of at least four of the containers in issue were appropriate pursuant to Rule 9 of the Rules on Containers in the 1974 Collective Bargaining agreement.[1]

It has long been held that work preservation provisions are valid and enforceable parts of labor-management collective-bargaining agreements, even if those provisions operate to deprive other interested labor of the opportunity to perform the work so protected. National Woodwork Mfrs. Assoc. v. N.L.R.B., 386 U.S. 612, 64 LRRM 2801 (1967); International Container Transport Corp. v. NYSA, Inc., 426 F.2d 884, 74 LRRM 2530 (2d Cir., 1970). The issue, then, is whether the contract provisions in question, Rule 1(a)(3) and Rule 2B(2), are valid work preservation provisions. In resolving the question, this Court must

[1]An arguable issue as the validity of the fines levied on U.S. Lines for containers taken off the S.S. American Legion and dispatched prior to October 1, 1974 is of no importance as to the propriety of granting or, as the Court here does, denying the injunctive relief prayed for.

carefully analyze the history of container traffic in the Port of Hampton Roads.

For several decades, employees represented by the I.L.A. have performed essentially all the labor required in loading and unloading cargo at piers and waterfront terminals in the Port of Hampton Roads. This work included cargo repair and maintenance, the preparation of cargo for loading, the sorting of cargo according to consignees and types, and the delivery of cargo to trucks on other inland carriers, as well as the physical loading and unloading of cargo ships.

Containerization, the handling of cargo in large enclosed boxes, first appeared in 1965 in the port of Hampton Roads. It threatened to drastically reduce the number of man-hours required to handle cargo, and thereby diminish substantially the work available for longshoremen. As a result, containerization became a major subject of collective bargaining, and the disputes surrounding the procedure's effect on the shipping industry culminated in a 56 day strike in 1968. I.L.A. and Hampton Roads settled their differences by way of the Containerization Clause and "Rules on Containers," first effective on October 1, 1968. Two subsequent contracts have been negotiated that include the Rules—one effective November 14, 1971 to September 30, 1974, and one effective on October 1, 1974 to September 30, 1977.

Previous to the 1968 effective date of the first contract containing the Rules, I.L.A. workmen stripped any containers that the stevedores indicated they should strip, including those holding "full container

loads," fully loaded containers intended for a single consignee. The 1968 and 1971 contracts, however, preserved to I.L.A. labor only the work of stripping less than full containers and containers with goods intended for more than one consignee. They did not preserve the stripping, even if close to the dock, of full container loads. It was not until 1974 that the Rules were redrafted to preserve for I.L.A. labor the stripping of full shippers loads done within a fifty mile radius of the Port (unless the stripping was done by the consignee's employees). These redrafted rules are the subject of the dispute in this case.

There was, then, a lapse of eight years in which the longshoremen did not have the right, under the ten effective contracts, to exclusively strip full shipment loads. This lapse was, the Court is satisfied, bottomed on a lack of comprehension of what was, during much of this period, a new concept of cargo transportation. Appreciable container traffic wasn't introduced in this area until the early 70's. This lack of comprehension is evidence by the I.L.A.-Hampton Roads Container Committee's misapplication of the 1968 and 1971 Rules on Containers in erroneously fining shipping lines for the stripping and reloading of full container loads by truckers during that period.

The degree of misapprehension under which the parties operated is also demonstrated by the extent of what was lost under the 1968 and 1971 contracts. A trucker picking up on the dock a fully loaded container consigned to a single consignee could have, under those contracts, with non-I.L.A. labor, broken

the seal and transferred, right on the dock, the contents of the containers to its truck. This, under any definition, would be dock loading and unloading—work which was historically performed by longshoremen. The newness of the concept of containerization, coupled with the adjustment time needed by all the industries affected by the process, must be expected to create temporary maladjustments in the legal agreements of the affected parties.

The Court concludes that the contract provisions in issue were intended and operate solely to preserve historical work practices, and that the eight year period during which the work in issue was not protected by contract does not serve to extinguish I.L.A.'s right to preserve by contract the right to strip full shipper loads within fifty miles of port in 1974. Supplemental but not determinative of the Court's independent conclusion as to this factual issue is the language contained in the parties' agreement of October 1, 1974 to the effect that *"the provisions are intended to protect and preserve the work jurisdiction of the longshoremen and all other I.L.A. crafts which was performed at deepsea waterfront facilities. The rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea I.L.A. labor."*[2] The action here complained of may be

[2]Additionally, the parties to the 1974 agreement recognized the infringement of I.L.A. historical work function for even the traffic in exempt containers (less than full load, consolidated loads, etc.) by providing for a $2.00 per ton royalty to the I.L.A. for all exemptions referred to in the contract.

aptly described, to borrow a phrase of Mr. Justice Brennan, not as a sword to reach out for monopolistic purposes or the acquisition of *new* job tasks, but as a shield carried solely to preserve work which historically has been that of the members of respondent unions. Such is not an unfair labor practice. Re-acquisition and preservation of traditional work is the purpose of the respondent union's actions, and this is both appropriate and legal. National Woodwork Mfrs. Asso. v. N.L.R.B., 386 U.S. 612, 64 LRRM 2801 (1967); see American Boiler Mfrs. Asso. v. N.L.R.B., 404 F.2d 547, 69 LRRM 2851 (1968). The Court finds that there is no reasonable cause to believe that Rules on Container 1a(3) and 2B(2) operate to create unfair labor practices in violation of the National Labor Relations Act.

The specific request for injunctive relief in reference to the suspension of the Warehouse Clause (Rule 2B(4)), under this record is inappropriate under the standard by which this Court is bound, for the issue is moot. Injunctive relief is no longer a proper remedy.

An appropriate order will issue.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of January, A.D. 1976.

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-684

PACIFIC MARITIME ASSOCIATION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and its LOCALS 13, 63, 10 and 34,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Pursuant to Rule 24(5) and the requirements of this Court, petitioners hereby file this printed supplemental brief to its petition for certiorari filed on November 10, 1975. This printed supplemental brief is a verbatim repetition of the text of the letter sent by petitioners to the Court on January 21, 1976.

TEXT OF LETTER DATED JANUARY 21, 1976.

This letter is in the nature of a supplemental brief pursuant to Rule 24(5) with a request that the Court defer consideration of Petitioners' joint petition for certioriari filed on November 10, 1975. The reason for writing a letter rather than writing a formal brief or motion is that Petitioners understand that the Court's consideration of their petition for certiorari may be imminent. Therefore in the interest of bringing to the Court's attention certain new developments before a

decision on the petition has been reached, a letter format has been chosen.

The new development is the granting of an expedited appeal of the recent decision by the NLRB in *International Longshoremen's Ass'n (Consolidated Express, Inc.)* (December 4, 1975), 221 NLRB No. 144, 90 LRRM 1655. The case holds that provisions in a collective bargaining agreement between the International Longshoremen's Association and the New York Shipping Association assigning container loading and unloading work to longshoremen are invalid "hot cargo" provisions under Section 8(e). For the convenience of the Court a copy of the decision is attached to this letter.* The case has been appealed to the Second Circuit by the International Longshoremen's Association and the New York Shipping Association (Case No. 75-4266). Because of the importance of the case and the possibility of significant labor unrest on the New York waterfront the Second Circuit granted an expedited hearing procedure. Petitioner's briefs will be filed this Friday, January 23rd and the Respondent's briefs will be due on February 12, 1976. Counsel for the New York Shipping Association has informed Petitioners that he expects oral argument to occur sometime between late February and mid-March.

In view of the similarity of the facts between the instant case involving the assignment of container work on the West Coast and this new case involving the assignment of container work on the East Coast and the fact that the critical determinations by the NLRB are the same in both cases, Petitioners respectfully suggest to the Court that it would be appropriate

*In this printed brief no copy has been attached.

to defer consideration of their petition for certiorari until the Second Circuit has handed down a decision. Such deferral would be appropriate not only because it is imperative that the legal standards governing the performance of container work be the same on both coasts, but also because a deferral of the instant petition will not prejudice any party or person. Petitioners have not and are not now enforcing the collective bargaining provisions which have been held invalid by the NLRB. Thus a delay can have no effect on the NLRB, the Intervenors, or any other person.

That the two cases are strikingly similar and in many respects identical is apparent from even a cursory reading of the decisions. Thus the Board has held in both cases that the traditional work of longshoremen is confined to the mere loading and unloading of ships and does not extend to the preparing and sorting of break bulk cargo before loading and after unloading. The effect of such a holding is to foreclose application of the "work recapture" doctrine set forth in *American Boiler Manufacturers Assn. v. NLRB* (8th Cir. 1968), 404 F.2d 547, *cert. den.*, 398 U.S. 960 (1970) and the applicability of this doctrine is one of the main points urged in the petition for certiorari before this Court.

In both cases the Board viewed the disputed work from a fallacious geographical perspective. Thus both decisions considered the disputed work to be the loading and unloading of containers at off dock stations by nonlongshoremen and concluded that therefore longshoremen to not have a traditional history of doing the disputed work at those locations (although longshoremen have done all such work on the dock).

In both cases the petitioners have urged that this is an improper formulation of the disputed work because it means that almost every agreement involving work assignment clauses would be invalid since work preservation agreements usually come into being because others have begun to do the same work elsewhere. The disputed work should be regarded as simply the loading and unloading of containers just as in *National Woodwork Mfg. Ass'n. v. NLRB* (1967), 386 U.S. 612 the work in dispute was the preparation of blank doors in general and not the preparation of doors at a particular manufacturer's plant.

The Board in both decisions also improperly rested its determination on what Petitioners have termed in their prior briefs as the "effect on others" standard. Thus the Board in the West Coast case said that although the union and employer had not attempted to require the assignment of shippers loads (approximately 85% of all containers) to the bargaining unit, they in the future could claim such work and such a claim would have an "erroneous impact" on the shipping industry. Therefore the claim to the lesser work was unlawful. The identical erroneous reasoning was applied in the East Coast case.

There is a substantial chance that the Second Circuit will not sustain the Board's approach since the Second Circuit has already ruled in context of an antitrust case that some of the same collective bargaining clauses in issue before the NLRB were lawful work preservation clauses. *International Container Transport Corporation v. New York Shipping Ass'n.* (2d Cir. 1970), 426 F.2d 884. Moreover, in a district court decision brought to the Court's attention in Petitioners' supplemental

brief, *Humphrey v. International Longshoremen's Ass'n.* (E.D. Va. 1975), ... F.Supp. ...., 90 LRRM 2838, Judge Merhige decided that collective bargaining provisions similar to those on appeal before the Second Circuit could not be enjoined under Section 10(1) because the Regional Director had not even presented cause to believe that a violation of Section 8(e) had occurred.

Petitioners have kept this letter brief in order to bring this new development to the Court's attention immediately. If the Court would wish to have further briefing on the matter, Petitioners would, of course, be willing to provide such briefing.

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Supreme Court, U. S.
FILED
DEC 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-684

PACIFIC MARITIME ASSOCIATION AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and its Locals 13, 63, 10 and 34,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief of Respondent California Cartage Co., Inc. in Opposition to Petition for Certiorari.

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-684

PACIFIC MARITIME ASSOCIATION AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and its Locals 13, 63, 10 and 34,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief of Respondent California Cartage Co., Inc. in Opposition to Petition for Certiorari.

Petitioners argue that the decision herein conflicts with a decision of this Court and Courts of Appeal. It is clear, however, that no such conflict exists. The Court of Appeals properly held that the National Labor Relations Board findings were supported by substantial evidence on the record as a whole. Accordingly, a grant of Certiorari would not be warranted.

OPINIONS BELOW.

The Court of Appeals enforced the Decision and Order of the National Labor Relations Board as supported by substantial evidence on the record as a

whole, 515 F.2d 1018. Petitions for Rehearing and Suggestion for Rehearing *en banc* filed by both Petitioners herein were denied on August 11, 1975. Said Decisions are attached hereto as Appendix "A". The Board's Decision affirming the rulings, findings and conclusions of the Administrative Law Judge is reported at 208 NLRB No. 130. The Board's Decision and Order and the Decision and Order of the Administrative Law Judge are attached hereto as Appendix "B".

QUESTION PRESENTED.

Whether the Decision of the National Labor Relations Board as enforced by the Court of Appeals for the District of Columbia is in conflict with Decisions of this Court and other Courts of Appeals by finding that agreements and conduct the object of which is to satisfy union objectives outside the bargaining unit violate Sections 8(e), 29 USC 158(e) and 8(b)(4)(i) and (ii)(B), 29 USC 158(b)(4)(i) and (ii)(B) of the National Labor Relations Act as Amended (Act).

STATUTE INVOLVED.

This case involves the provisions of Section 8(e) and Sections 8(b)(4)(i) and (ii)(B) of the Act, which provide in relevant part as follows:

8(e):

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied,

whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

8(b)(4)(i) and (ii)(B):

It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person . . .

Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

STATEMENT OF THE CASE.

1. Introduction.

In October of 1972 an Administrative Law Judge (ALJ) issued a Decision and Recommended Order that Petitioner Pacific Maritime Association (PMA) and Petitioner International Longshoremen's and Warehousemen's Union (ILWU) and certain of its Locals violated Section 8(e) of the Act, as amended, by entering into, maintaining and enforcing the provisions of the Container Freight Station Supplement, and, further, that the ILWU and certain of its Locals had violated Sections 8(b)(4)(i) and (ii)(B) of the Act, as amended, by inducing, encouraging and restraining PMA and its member companies with an object of forcing and requiring them to cease doing business with California Cartage Co., Inc. and others. Exceptions to that decision were filed and the NLRB heard oral argument on September 13, 1973. On February 11, 1974 the full Board, in a unanimous decision, affirmed the rulings, findings and conclusions of the ALJ and adopted his Recommended Order with certain modifications.

Separate Petitions for Review were filed with the Court of Appeals for the District of Columbia Circuit by the PMA and the ILWU and certain of its Locals. Cross-Applications for Enforcement were filed by the National Labor Relations Board. On June 26, 1975 the Court of Appeals found that the Opinion, Findings and Order of the Board were supported by substantial evidence on the record as a whole and that the Petitions for Review must be denied and the Order of the Board enforced. Thereafter, Petitioners PMA, ILWU and certain of its Locals filed timely Petitions for

Rehearing and a Suggestion for Rehearing *en banc*. On August 11, 1975 the Court of Appeals denied the Petition for Rehearing, and, having transmitted the Suggestions for Rehearing *en banc* to the full Court and no Judge having requested a vote thereon, denied Petitioners' Suggestion for Rehearing *en banc*.

2. Historical Background.

Respondent California Cartage Co., Inc. (Cal Cartage) is engaged in the handling, storage and transportation of interstate freight and the operation of a container freight station, as well as public and private warehouses and storage yards. [TR 100, 113-14, 117.[1]] Beginning in the 1940's Cal Cartage and other motor carriers have collected, consolidated and transported cargo to the first place of rest on a marine dock as to outbound loads and after the last place of rest on a marine dock with respect to inbound loads. [TR 50, 517, 520-22.]

Until 1960 it was the practice of Longshoremen on outbound shipments to take the cargo from the "skin of the dock" and replace it on pallets for loading aboard ship. Inbound shipments were handled in reverse manner. (ALJD 12; TR 1211-13.] In 1960 the PMA and ILWU entered into a mechanization and modernization agreement which eliminated make-work and feather-bedding practices such as the repalletization of cargo. Thereafter, palletized cargo delivered by motor

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[1]References are abbreviated as follows: NLRB Decision and Order: Bd. Dec.; Administrative Law Judge's Decision and Recommended Order: ALJD; Transcript of Testimony Before the Administrative Law Judge: TR; General Counsel's Exhibits: "GCX" except Exhibits A through U to GCX 2 (all party stipulation) will be referred to as [Stip. Ex. ....].

carrier employees represented by the Teamsters Union was loaded directly aboard ship without rehandling. [Bd. Dec. 4, ALJD 10; TR 12, 1213, 1214; Stip. Ex. G (14) pp. 2-3.]

3. Early Development of Unitized Loads.

In the 1950's and '60's Cal Cartage stuffed and unstuffed a substantial number of wooden containers and boxes for various steamship companies pursuant to a tariff under which Cal Cartage was compensated directly by the steamship line. At all times the stuffing and unstuffing and hauling were performed by employees of Cal Cartage who were members of the Teamsters Union. The procedures followed were generally the same. On outbound container loads Cal Cartage employees picked up the cartage at various locations in Los Angeles and stuffed the cargo into the boxes or containers at the off-dock Cal Cartage trucking facility and delivered the cargo to the dock. On inbound loads the procedure was generally reversed. [ALJD 8; TR 52, 55, 71, 77.] The work of stuffing and unstuffing freight consisted of both less than container loads and straight loads.[2]

4. Container Freight.

The modern container made it possible to handle all cargo as an integrated unit from shipper to motor carrier to steamships. These containers are constructed

[2]Less than load cargo (LCL or LTL) is cargo carried by container or truck which has more than one export mark and which originates from more than one shipper and is destined for more than one consignee. Straight loads, on the other hand, are defined as one type of cargo in containers and boxes on a single bill of lading for a single shipper. [Bd. Dec. 3; ALJD 11; TR 56, 164-65, 856, 886.]

of steel or aluminum and are equivalent to the dimensions of a truck-trailer body. The result is an integrated transportation system designed to carry freight without rehandling by vessel, truck, air or rail. [TR 157, 449-50, 462, 982-83.]

5. Container Freight Stations.

Steamship companies have traditionally contracted with motor carriers such as Cal Cartage to stuff and unstuff shippers' and consignees' freight to and from containers. [TR 60-61, 465-66, 740, 745, 980-81.] These containers have required motor carriers such as Cal Cartage to establish container freight station facilities with rail sidings and truck docks to stuff and unstuff containers and to warehouse and distribute the freight. [TR 3, 119-20.]

6. History of Container Freight Station Operations in Los Angeles.

The first container ship on the Pacific Coast was placed in service in 1959. It was serviced by the only container freight station at that time which was the Pacific Motor Trucking (PMT) facility which used Teamster-represented employees to stuff and unstuff containers. [ALJD 12; TR 188, 438, 566-67.] This was followed in 1962 by Sealand which opened a waterfront container freight station and yard. This container station was staffed by employees of Sealand who were represented by the Teamsters Union. [TR 186-87, 214-15, 522-23, 1334.]

Cal Cartage has operated a container freight station since about 1966. This container freight station is approximately two and one-half miles from the nearest

dock and services a number of shipping lines as well as non-shipping companies and freight forwarders on the East Coast and in Europe. [ALJD 8; TR 100, 113-14, 116-17, 126-27, 406-08, 130.]

Throughout the late 1960's a number of other motor carrier companies using employees who were represented by the Teamsters Union established container freight station operations. [TR 180, 187-93, 197, 214-16, 232-33, 235-38, 240-45, 247-54, 1227.]

There were two other container freight stations which were operated by members of Petitioner PMA. While Petitioners in their Brief at pages 14 and 15 assert that a substantial amount of stuffing and unstuffing was being done by Longshoremen, these PMA member container stations were in fact staffed by employees who were not part of the Longshore workforce.[3] Even as late as January 1971 the only other container freight station operated by a PMA member was exclusively staffed by non-Longshore terminal warehousemen. [ALJD 13; TR 208-11, 214, 265, 314-15, 961-64, 1009-10, 1066-67, 1194-96, 1345-48.]

7. History of ILWU Collective Bargaining Agreements.

A. Traditional Coverage.

Longshore contracts have traditionally applied only to movement of cargo on marine docks. Longshore work has been defined in successive contracts since 1937 as including the handling of cargo in its transfer

[3]These employees were known as terminal warehousemen or TW's. While they were members of ILWU Local 13, they worked under separate collective bargaining contracts in a totally separate bargaining unit. Even after the Petitioners executed the Container Freight Station Supplement, these PMA members continued to use terminal warehousemen at their container freight stations.

from vessel to first place of rest and vice versa, including sorting and piling of cargo on the dock, and the direct transfer of cargo from vessel to railroad car or barge and vice versa, when such is performed by employees of the companies party to the agreement. [Section 1 of Stip. Ex. G 3-11.]

B. Mechanization and Modernization Agreement.

In the memorandum of August 10, 1959 and October 18, 1960 the ILWU agreed to divest itself of make-work-featherbedding practices. It also agreed not to protest reduction of work due to mechanization and modernization such as introduction of new methods of cargo handling designed to increase productivity and speed up handling of cargo. (Bd. Dec. 45; ALJD 10.) This led to the use of the modern container and revolutionary new stevedore equipment. The agreements contemplated a loss of jobs for Longshoremen due to the mechanization. In exchange for these agreements the PMA established a fund of $29,000,000 and later an additional $34,000,000 for pension augmentation, vested retirement benefits and unemployment due to introduction of new cargo handling methods. [ALJD 10; TR 1155-57; Stip. Ex. G 14, Section B.] In addition, the parties agreed that for the first time in twenty-three years the contractual definition of longshore work would include certain dock work between the first and last places of rest on the dock, but whether to perform this work under the agreement was expressly left to the option of PMA members. [Stip. Ex. G, 14 ¶¶ 11, 12, pp. 2-3.]

Successive Pacific Coast Longshore and Clerks Agreements since 1961 have continued to provide that the

only work covered thereunder is work with respect to the movement of cargo which is under the control of PMA members and at a dock. [Section 1.11 of Stip. Exs. A, B, T-15 and I-10; GCX 3, Appendix A, p. 1.] Disclaimers with respect to Longshore rehandling of palletized, unitized or package loads were contained in the Mechanization and Modernization Agreement and successive Pacific Coast Longshore Agreements since 1961. [Sections 1.22, 1.23 of Stip. Exs. A, G; Stip. Ex. G 14, ¶ 16, p. 3.]

8. Unfair Labor Practices.

A. Negotiation of Container Freight Station Supplement of January 5, 1970.

Notwithstanding the nearly universal practice of stuffing and unstuffing modern containers at container freight stations operated by motor carriers during the 1960's, ILWU and PMA in January 1970 entered into the Container Freight Station Supplement. This agreement provided *inter alia* that all container freight station work other than shippers' loads and door-to-door deliveries was to be brought to the dock or areas adjacent to the dock and to be performed by ILWU personnel on or before June 30, 1970. That Agreement further provided that the transition period within which the work was to be brought to the dock would extend until the expiration dates of existing contracts for the work plus the additional necessary time to build, lease or provide for a new facility or expansion of present facilities if such was required. [Bd. Dec. 6; ALJD 11; Stip. Ex. C, §§ 1.5, 1.51.]

B. June 30, 1971 Work Stoppage.

On June 14 and 24, 1971 Respondents ILWU and Local 13 advised its members that at 12:01, June 30, 1971 containers not stuffed by Longshoremen (other than shippers, military and door-to-door loads) would not be loaded aboard ship. [ALJD 18-19, GCX 2, ¶¶ 7, 9.][4] Petitioners argue in their Brief at pages 18 and 19 that the 8(b)(4) violation found against the ILWU and its Locals consisted solely of efforts directed towards PMA members. To the contrary, the President and the Vice President of Local 63 instructed Longshoremen and Clerks not to load any non-ILWU container unless it was a shipper's load. During a conversation with these Union officers, the Vice President of Cal Cartage was informed by telephone that under the Container Freight Station Supplement no Cal Cartage containers were to be received at the Los Angeles container terminal. Thereafter, a Los Angeles container terminal representative informed the Cal Cartage representative that if he attempted to order his employees to receive a Cal Cartage container the entire complement of Longshore employees would walk off the job. [ALJD 19, 20; TR 355-60, 391-92, 400-03, 140-41, 409-18.]

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[4]While Petitioners repeatedly contend that the Container Freight Station Supplement applies only to less than full container loads, as the Board found, a substantial number of the containers stuffed and unstuffed by Cal Cartage are in fact straight loads and not LCL loads, yet the Longshoremen attempted to apply their contract to those loads as well. [TR 355-60, 391-92, 400-03, 140-41, 409-18.]

C. Execution of Memorandum of Understanding, February 10, 1972.

Petitioners entered into a Memorandum of Understanding which in part amended the Container Freight Station Supplement and provided in part that PMA members shall cease their past practice of contracting the stuffing and unstuffing of containers in various zones defined in the Agreement to employers who are not signatory to the Agreement. The Memorandum also provides that even where containers are carried by a non-PMA member steamship vessel such containers are to be stuffed by ILWU employees covered by the collective bargaining agreement. [ALJD 11, 15, 19; GCX 3, ¶ 3.]

ARGUMENT.

1. The Decision Below Does Not Conflict With National Woodwork Manufacturers Association v. NLRB, 366 U.S. 612 (1967).

A. In Its Attempt to Show a Conflict Between National Woodwork and the Decision Below, Petitioners Misconstrue the Findings of the Board.

The Board did not state, as Petitioners argue, that the contract affected third parties and was therefore unlawful. Rather, the Board found that the very object of Petitioners was the labor policies of Cal Cartage and other motor carriers. Petitioners correctly state that *National Woodwork* held that a union might legitimately protect traditional work assignments irrespective of the impact on a third party. However, this Court cautioned that it was not permissible for a union to use the boycott in a manner tactically calculated to satisfy union objectives elsewhere. The Board correctly stated that *National Woodwork* is essentially a rule of law which requires a complex factual analysis. This Court made clear that the determination of the legality of restrictive clauses such as those in the instant case was not simple and must be made with full concern of all the surrounding circumstances as to whether the union's objective was preservation of work or to satisfy union objectives elsewhere.

The Board found that the work in question was traditionally performed by Cal Cartage and other motor carriers and that the union's object was to force and require PMA members to cease doing business with those companies. In fact, the Board clearly followed the instruction in *Woodwork* and made a factual inquiry into the economic personality of the industry and

the history of labor relations between the union and the employers who would be boycotted. Furthermore, the Board held, based on substantial evidence, that the work of stuffing and unstuffing was not in fact the traditional work of the Longshore workforce. Contrary to Petitioners' assertion, the Decision below did not fail to consider whether the work covered was a technological substitute for traditional unit work, but indeed found quite to the contrary that the traditional work of the Longshore unit was the loading and unloading of ships which they continue to perform. The dockside work of repalletization effectively bargained away in 1960 was mere make-work to begin with, hardly sufficient to support a claim of traditional work in Petitioners' attempt to acquire the work performed by Cal Cartage.

2. The Decision Below Does Not Conflict With the Decisions of Other Courts of Appeals.

A. The Work in Question Is Not the Traditional Work of the Longshore Unit.

Petitioners attempt in vain to show a conflict in several Courts of Appeals Decisions, including the Court of Appeals of the District of Columbia. Petitioners, as in their treatment of the holding of this Court in *National Woodwork*, ignore the factual finding that the object of the ILWU was to seek work traditionally performed outside the Longshore work unit. *American Boiler Manufacturers Association v. NLRB*, 404 F.2d 547 (CA8 1968), cert. den, 398 U.S. 960 (1970) relied on by Petitioners' is not in conflict with the instant case. There the Court pointed out that "traditional work" included work performed and still per-

formed by unit employees at a time a work preservation clause was negotiated. Or, as the Board recently stated in *International Longshoremen's Association, AFL-CIO (Consolidated Express Inc., et al.)*, 221 NLRB No. 144 (1975), "*National Woodwork, supra* and *American Boiler Manufacturers Association v. NLRB* cases are distinguishable from the instant case since, in those cases, the very work claimed had once been performed, exclusively, by employees in the units represented by the respondent organizations therein." In the instant case the ILWU sought work which traditionally had been performed by employees in other work units. *Cf., International Longshoremen's Association, Local 1248, AFL-CIO (U.S. Naval Supply Center)*, 195 NLRB 273 (1972).

B. The Work in Question Is Neither Fairly Claimable or Work Recapture.

It is clear that a finding of non-traditional work necessarily precludes a finding that the work is fairly claimable or work recapture. Moreover, the facts are clear that no such claim could be made in the instant case. The only container freight station work that had been performed by members of the ILWU was in fact performed by non-unit Terminal Warehousemen. Those Terminal Warehousemen who had been represented by ILWU Local 13 were represented under separate collective bargaining agreements and were engaged in public warehousing work, which clearly included the stuffing and unstuffing of containers at container freight stations. [TR 963-64, 1345, 1347.] In fact, even after the negotiation of the Container Freight Station Supplement, Terminal Warehousemen

continued to do container freight station work. [TR 196-97, 208, 211, 214, 265, 314, 317, 957-58, 961-64, 1009-11, 1016-17, 1066-67, 1194-96 and 1226.] The Container Freight Station Supplement does not permit Terminal Warehousemen working at stuffing and unstuffing at a CFS to become Longshoremen. (Stip. Ex. C, Sections 1.24, 7.21.]

At best, the Petitioner ILWU has sought to acquire work for union members generally. This is clearly impermissible, *Sheetmetal Workers Local 223 v. NLRB*, 498 F.2d 687 (CADC 1974) and *National Maritime Union v. Commerce Tankers Corporation*, 457 F.2d 1127 (C.A.2 1972). In *NLRB v. National Maritime Union* (*Commerce Tankers Corp.*), 486 F.2d 907 (C.A. 2 1973), the Court rejected a union's work protection argument noting "The beneficiaries of the union clause will not be those members now employed on the vessels, but the union as a whole." The same rationale was recently followed in *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB No. 124 (1972), in which the Board stated "Agreements and conduct intended to protect, preserve, acquire or reclaim work for union members generally (*i.e.*, outside the immediate bargaining unit) violate both Sections 8(e) and 8(b)(4)(B) of the Act on the theory that they exceed the legitimate interests of the unit employees *vis-a-vis* their own employer and are therefore tactically calculated to satisfy union objectives elsewhere."[5]

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[5]Petitioners' "fairly claimable" argument in reliance on cases such as *Canada Dry Corporation v. NLRB*, 421 F.2d 907 (1970) is particularly inapposite, for, unlike the instant case, the court found the record "devoid of any evidence of a secondary objective."

3. Petitioners' Supplemental Brief Raises No Issue That Supports a Conflict in Decisions but Shows That Each Case Turns on Individual Facts.

Petitioners' attempt to show an inconsistency between the present case and the Decision of Judge Merhige in *Humphrey v. International Longshoremen's Association*, ... F.Supp. ....., 90 LRRM 2838 (E.D. Va. 1975) shows only an application of the doctrine set forth in *National Woodwork*. The Court in *Humphrey* stated that in that case "The contract provisions at issue were intended and operate solely to preserve historical work practices and that the eight year period during which the work in issue was not protected by contract does not serve to extinguish I.L.A.'s right to preserve by contract the right to strip full shipper loads within fifty miles of port in 1974." The Court goes on to make clear that the above finding was essentially a factual determination.[6]

CONCLUSION.

The essence of the instant case is a factual finding that Petitioners sought work tasks which were traditionally performed by employees of a different bargaining unit. Under such circumstances, the National Labor

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[6]Petitioners' concern about different legal standards between the East and West Coast is unfounded. If such a difference existed it would simply reflect different facts between two separate sets of unions and employees; moreover, it is noted that the Board has recently overturned the conclusions of ALJ Ordman relied on by Petitioners in *International Longshoremen's Association, AFL-CIO* (*Consolidated Express, et al.*), 221 NLRB No. 144 (1975).

Relations Act, as amended, provides in Section 10(e), 29 USC § 160(e) "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Furthermore, Section 10(f), 29 USC § 160(f) provides that the parties may petition to a Court of Appeal and "Upon the filing of such petition the Court shall proceed in the same manner as in the case of an application by the Board under Subsection (e) of this Section. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." Furthermore, as this Court stated in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), "Our power to review the correctness of application of the present standard ought seldom be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." There is no such misapprehension in this case. Clearly, there was substantial evidence to support a finding of an unlawful secondary objective. Indeed, the only parties that have misapplied *National Woodwork* and holdings of various Courts of Appeal have been the Petitioners. Here the facts show that Petitioners have placed pressure on members of the Pacific Maritime Association in

order to effect their objectives *vis-a-vis* California Cartage, PMT and other motor carriers whose employees are employed under a collective bargaining contract with the Teamsters Union.

Therefore, under such circumstances a grant of certiorari is not warranted.

Respectfully submitted,

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APPENDIX

APPENDIX A.

Judgment.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1974.

Pacific Maritime Association, Petitioner v. National Labor Relations Board, Respondent, California Cartage Company, Inc., Pacific Motor Trucking Company, Intervenors. No. 74-1266.

International Longshoremen's and Warehousemen's Union; Local 13, et al., Petitioners v. National Labor Relations Board, Respondent, Pacific Motor Trucking Company California Cartage Company, Inc., Intervenors. No. 74-1296.

Filed: June 26, 1975.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board.

Before: ROBB and WILKEY, Circuit Judges and MERHIGE,* United States District Judge for the Eastern District of Virginia.

These causes came on to be heard on petitions for review and cross applications for enforcement of an order of the National Labor Relations Board and were argued by counsel. While the issues presented occasion no need for an opinion, they have been

*Sitting by designation pursuant to 28 U.S.C. § 292(d).

accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that for the reasons stated in the decision and order of the National Labor Relations Board, 208 N.L.R.B. No. 130 (Feb. 11, 1974) the court is of the opinion that the findings and order of the Board are supported by substantial evidence on the record as a whole and that the petitions for review must be denied and the order of the Board enforced.

Per Curiam
For the Court
/s/ Hugh E. Kline
Hugh E. Kline
Clerk

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1974.

Pacific Maritime Association, Petitioner v. National Labor Relations Board, Respondent. California Cartage Co., Inc. Pacific Motor Trucking Co., Intervenors. No. 74-1266.

International Longshoremen's and Warehousemen's Union; Local 13, et al., Petitioners v. National Labor Relations Board, Respondent. Pacific Motor Trucking Co., California Cartage Co., Inc. Intervenors. No. 74-1296.

Filed: Aug. 11, 1975.

Before: Robb and Wilkey, Circuit Judges; and Merhige*, United States District Judge for the Eastern District of Virginia

On consideration of the petition for rehearing filed by Petitioner Pacific Maritime Association and the petition for rehearing filed by Petitioner International Longshoremen's and Warehousemen's Union; Local 13, et al., it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam
For the Court:
HUGH E. KLINE, Clerk
By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Judge Merhige did not participate in the foregoing order.

*Sitting by designation pursuant to 28 U.S.C. §292(d).

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1974.

Pacific Maritime Association, Petitioner v. National Labor Relations Board, Respondent. California Cartage Co., Inc. Pacific Motor Trucking Co., Intervenors. No. 74-1266.

International Longshoremen's and Warehousemen's Union; Local 13, et al., Petitioners v. National Labor Relations Board, Respondent. Pacific Motor Trucking Co., California Cartage Co., Inc., Intervenors. No. 74-1296.

Filed: Aug. 11, 1975.

The suggestions for rehearing *en banc* of Petitioner Pacific Maritime Association and Petitioner International Longshoremen's and Warehousemen's Union; Local 13, et al. having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that Petitioners' aforesaid suggestions for rehearing *en banc* are denied.

For the Court:
Hugh E. Kline, Clerk
By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX B.

Decision.

United States of America, Before the National Labor Relations Board, Division of Judges, Branch Office, San Francisco, California.

International Longshoremen's and Warehousemen's Union, Local 13, International Longshoremen's and Warehousemen's Union; and Local 63, International Longshoremen's and Warehousemen's Union (California Cartage Company, Inc.) and Robert A. Curry International Longshoremen's and Warehousemen's Union; Local 13, International Longshoremen's and Warehousemen's Union; and Local 63, International Longshoremen's and Warehousemen's Union Respondent Unions and Pacific Maritime Association Respondent Employer and California Cartage Company, Inc. Pacific Motor Trucking Company Charging Parties. Case No. 21-CC-1326, Case No. 21-CE-103, Case No. 21-CE-112, Case No. 21-CE-109, Case No. 21-CE-111.

International Longshoremen's and Warehousemen's Union; Local 10, International Longshoremen's and Warehousemen's Union; and Local 34, International Longshoremen's and Warehousemen's Union Respondent Unions and Pacific Maritime Association Respondent Employer and International Cargo Services, Inc.; Richmond Export Services, Inc. Charging Parties. Case No. 21-CE-116, (Formerly Case No. 20-CE-88).

James S. Scott, Esq., and *John W. Prager, Esq.*, of Los Angeles, Calif., Counsel for the General Counsel.

Thomas P. Burke, Esq., and *David E. Rosenbaum, Esq.*, of *Rutan & Tucker*, Los Angeles, Calif., for the Charging Party, California Cartage Company, Inc.[1]

William E. Still, Esq., and *Robert S. Bogason, Esq.*, of Southern Pacific Transportation Company, San Francisco, Calif., appearing on behalf of Charging Party, Pacific Motor Trucking Co.

R. Bruce Hoffe, Esq,. of *Watson, Hoffe & Sannin*, Richmond, Calif., appearing on behalf of Charging Parties, International Cargo Services, Inc., and Richmond Export Services, Inc.

George A. Pappy, Esq., of *Brundage, Neyhart, Miller, Ross & Reich*, appearing as an interested party on behalf of the Union representing the employees of the Charging Parties.

Norman Leonard, Esq., and *Richard Patsey, Esq.*, of *Gladstein, Leonard, Patsey and Andersen*, San Francisco, Calif., appearing on behalf of Respondent Unions.

Kenneth E. Ristau, Jr., Esq., and *Kenneth W. Anderson, Esq.*, of *Gibson, Dunn & Crutcher*, Los Angeles, Calif., appearing on behalf of Respondent Employer.

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[1]All parties herein were advised by formal document dated September 28, 1972, that:

Charging Party CALIFORNIA CARTAGE COMPANY, INC., hereby substitutes MITCHELL, SILBERBERG & KNUPP, HARRY J. KEATON, THOMAS P. BURKE, and DAVID E. ROSENBAUM, 606 South Olive Street, Suite 1922, Los Angeles, California 90014, as its attorneys of record in the place and stead of Rutan & Tucker, Harry J. Keaton, Thomas P. Burke, and David E. Rosenbaum.

DECISION

Statement of the Case

JAMES T. RASBURY, Administrative Law Judge: These consolidated matters, proceedings under Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, were tried before me at Los Angeles, California, on various dates between January 4 and June 7, 1972, with all parties participating pursuant to due notice upon consolidated complaint issued by the General Counsel.[2]

The complaint in 21-CC-1326 alleges that during the month of June, 1971, Respondent International, Respondent Local 13 and Respondent Local 63, herein Respondent Unions, engaged in, and induced and encouraged individuals employed by various persons, and threatened, coerced and restrained various persons engaged in commerce where an object thereof was to force or require persons engaged in commerce to cease handling or otherwise dealing in shipping containers

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[2]The original charge in Case No. 21-CC-1326 was filed June 30, 1971 and in Case No. 21-CE-103 on November 1, 1971, amended December 1, 1971. A consolidated amended complaint for these two cases only was issued December 9, 1971. Complaint issued in Case No. 21-CE-109 on December 29, 1971, based on a charge filed on December 7, 1971. At the opening of the hearing on January 4, 1972 a motion to consolidate the latter case (21-CE-109) with the former cases was granted. The hearing on the resulting consolidated matters was completed on January 19, 1972 and the hearing closed. Before time fixed for filing briefs expired and pursuant to motions duly filed, said record and matters were ordered reopened for the purposes of consolidation and receiving evidence in cases numbered 21-CE-111 (based upon charges filed February 24, 1972), 21-CE-112 (based upon charges filed February 24, 1972, and amended March 2, 1972) and 21-CE-116 (based upon a charge filed April 6 and amended April 19, 1972). The additional matters were heard on June 6 and 7, 1972 and the record closed.

stuffed or to be unstuffed by employees of California Cartage Company, Inc., herein called Cal Cartage, thereby violating Section 8(b)(4)(i) and (ii)(B) of the Act.[3]

The complaints in Cases No. 21-CE-103 and 21-CE-109 allege that Respondent Pacific Maritime Association, herein PMA, and Respondent Unions have engaged in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(e) of the Act,[4] in that said Respondents entered into,

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[3]Section 8(b) It shall be an unfair labor practice for a labor organization or its agents * * * (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * * (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the labor representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

[4]The pertinent and relevant portions of Section 8(e) of the Act read as follows:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract, or agreement, expressed or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer or to cease doing business with any other person, and any contract entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

invoked, and gave effect to a contract or agreement (the 1970-1971 container freight station supplement), whereby Respondent PMA, on behalf of its member-companies, agreed to cease or refrain from handling certain shipping containers stuffed or to be stuffed by employees of Cal Cartage or Pacific Motor Trucking Company, herein called PMT, or from otherwise doing business with Cal Cartage or PMT.

The complaints in Cases No. 21-CE-111, 21-CE-112 and 21-CE-116 alleged that Respondents[5] on or about February 10, 1972, entered into, and since then have maintained, in force and effect, a contract or agreement (the 1972 container freight station supplement), whereby Respondent PMA, on behalf of its member-companies, has agreed to cease doing business with Container Freight Station companies not employing workers covered by the ILWU-PMA contract, including, among others, Cal Cartage, PMT, International Cargo Services, Inc., herein called International Cargo, and Richmond Export Services, Inc., herein called Richmond Export.

The duly filed answers admit certain allegations of the complaint but deny that their course of conduct has in any way violated the Act.

All parties were ably represented and were afforded an opportunity to adduce evidence, to examine and cross-examine witnesses, and to file briefs. Excellent briefs, that have been most helpful, were received from

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[5]Locals 10 and 34 of International Longshoremen's and Warehousemen's Union, as well as the International Union and PMA are named as Respondents in 21-CE-116. Locals 13 and 63 of International Longshoremen's and Warehousemen's Union, the International Union and PMA are Respondents in the other four CE cases dealt with herein.

the General Counsel, Cal Cartage, PMT and each of the Respondents and they have been carefully considered.

Upon the entire record in the cases I make the following:[6]

Findings of Fact

I. Jurisdiction

Respondent PMA, a California corporation with its principal office and place of business at San Francisco, California, and a branch office at Wilmington, California, is an association of companies who are engaged in business in the States of California, Oregon and Washington as steamship companies, or stevedoring companies or in the operation of marine terminals, or in combination thereof. Respondent was organized for the purpose of, *inter alia,* and engages in negotiating and entering into collective-bargaining agreements on behalf of its members with the collective-bargaining representative of their employees, including Respondent Unions. In the course and conduct of their business operations described above the members of Respondent

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[6]At the hearing counsel for the interested parties (the various Teamsters Locals whose counsel was permitted to participate) moved to have the record in a current 10(k) proceeding admitted in evidence as a part of the record in this case. The motion was denied. On July 28, 1972, after the 10(k) hearing had been closed, the motion was renewed in writing. The motion is again denied. See *Brady-Hamilton Stevedore Company,* 198 NLRB No. 18, wherein Judge George O'Brien refused to accept a 10(k) record as evidence and was sustained by the Board.

A motion to correct the transcript was filed by Respondent PMA on March 30, 1972 and served on all parties. No objections having been received the motion is granted and the corrections to the transcript attached hereto as Appendix A.

PMA annually derive gross revenue in excess of $50,000 from the transportation of goods and passengers between the State of California and other states or foreign countries.

The complaints allege, the answers admit, and I herewith find that Respondent PMA is now, and has been at all material times herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Sections 2(2), (6) and (7), 8(b) and 8(e) of the Act. I also find the Charging Parties and each of them respectively is an employer within the meaning of Sections 2(2), (6) and (7), 8(b) and 8(e) of the Act.

II. The Labor Unions Involved

Respondent Unions do not deny and I herewith find that, at all times material herein, each of the Respondent Unions has been a labor organization within the meaning of Sections 2(5), 8(b) and 8(e) of the Act. I further find in accord with a stipulation by the parties hereto that during the month of June 1971, John Pandora occupied the position of president of Respondent Local 13, and is now, and has been at all times material herein an agent of Respondent Local 13, acting on its behalf, within the meaning of Section 2(13) of the Act. I further find in accord with the stipulation submitted by the parties hereto that during the month of June 1971, Joe Argentio occupied the position of vice president of Respondent Local 63, and is now, and has been at all times material herein, an agent of Respondent Local 63, acting on its behalf, within the meaning of Section 2(13) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issue*

While violations of proscribed conduct under both Sections 8(b) (4) and 8(e) are alleged, a determination of the purpose, or object, of the disputed contract language negotiated and agreed to by the party Respondents will provide a basis for answers to all matters litigated.[7]

Respondents contend that the language in the supplemental contract giving rise to this dispute is nothing more than work preservation language sanctioned by the Board and the Supreme Court in *National Woodwork,*[8] and thus the Respondent Union's conduct in implementing the contract is not proscribed by the Act.

The General Counsel and the Charging Parties contend that the disputed language restricting the contracting out of container freight station operations has been designed to acquire new work and is thus proscribed by 8(e).

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[7]The 1966-1971 ILWU-PMA contract as applied to longshoremen's work is part of the stipulation and appears in the record as General Counsel's Exhibit 2a; a contract between the same parties for the same period as applied to marine clerks is part of the stipulation and is in the record as General Counsel's Exhibit 2b; (these two contracts are called Pacific Coast Longshore and Clerks Agreement, or the PCLCA). The container freight station supplement negotiated by and between the Respondent PMA and the Respondent Unions became effective January 5, 1970 and is part of the stipulation appearing in the record as General Counsel's Exhibit 2c. The various changes to the three aforementioned agreements that were negotiated and became effective February 10, 1972 to run through June 30, 1973, appear in the record as Appendix A to the all party stipulation entered in evidence as General Counsel's Exhibit 3.

[8]*National Woodwork Manufacturers v. N. L. R. B.*, (1967), 386 U.S. 612.

B. *Background*

1. The parties

RESPONDENT PMA is an association of companies engaged in business in the States of California, Oregon and Washington as shipping lines, or terminal operators, or as stevedores, or as combinations thereof. Since 1934 Respondent PMA and Respondent International have bargained collectively on a Pacific coastwide basis concerning the longshore employees of the member companies of Respondent PMA. Since 1947 the parties have bargained on the same basis with regard to marine clerks. Since 1961 bargaining has been conducted in a single coastwide unit covering the longshoremen and marine clerks. The Board certified the Waterfront Employers Association of the Pacific Coast as the bargaining agent for a coastwide unit of longshoremen as an appropriate unit in 1938.[9] The association was reorganized and acquired its present name in 1949. PMA negotiates contracts with the ILWU and administers them on a daily basis. PMA and the ILWU jointly operate dispatch halls in each port area. From the dispatch halls longshore labor is dispatched on a daily or job basis to various locations on the waterfront. Longshoremen are paid by checks issued by PMA and PMA in turn is reimbursed by the stevedoring or terminal company to whom the employee is dispatched. PMA maintains a central records office, an accident prevention department, a training department, and in the administration of the Union contracts processes grievances and handles arbitration matters. There are 121 member companies shown on the PMA roster.

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[9]*Shipowners Association of the Pacific Coast,* (1938), 7 NLRB 1002.

The principal governing body is the Coast Board of Directors. Voting is provided by the by-laws and is based on a rather complex tonnage formula. However, of the total voting strength, the shipowners represent approximately 80 percent.

CAL CARTAGE, which is engaged in California in the transportation of freight by motor truck and related work, has, for a number of years been engaged in the stuffing and unstuffing of shipping containers for various Japanese shipping lines engaged in the transportation of containerized cargo by ship to and from the ports of Los Angeles and Long Beach, California. Cal Cartage has approximately 365 employees of which approximately 70 to 75 are engaged primarily in stuffing and unstuffing containers. Cal Cartage was first hired by the Luckenbach Shipping Line to stuff and unstuff a collapsible type container in 1953.

In late 1955 or early 1956, Cal Cartage performed services for Coastwise Lines, a steamship company operating between Los Angeles and Alaska. This work consisted of loading and unloading equipment utilized for unitizing freight. Cal Cartage has also done work for Matson Navigation Company, Sea Land, American President Lines and Pacific Far East Lines. Cal Cartage has performed stuffing operations for other vessel operators, such as States Lines, as well as for various nonvessel operators including freight forwarders. Since the fall of 1968, Cal Cartage has been party to agreements with three of the four members of what has been called the Japanese consortium—Mitsui Osk Lines, Ltd., herein Mitsui, Kawasaki Kissen Kaisha, Ltd., herein K-Line, and Yamashita-Shinnihon Steamship Company, Ltd., herein Y-S Lines. These shipping lines

ship containers through Los Angeles Container Terminal, herein LACT, located at Berth 131, San Pedro, California. Pursuant to these agreements Cal Cartage, for the account of each of the shipping lines, has stuffed and unstuffed containers at its container freight station located at 2401 East Pacific Coast Highway, Wilmington California, which is located approximately three miles from LACT. The cargo stuffed by Cal Cartage consists of LCL cargo (less than container load) involving several bills of lading which completely fill one or more containers. Cal Cartage has also done stuffing work for the Nippon Yusen Kaisha Steamship Lines, herein NYK Lines and Showa Steamship Line, which ship containers through the Port of Los Angeles on ships operated by NYK Lines. The terminal and stevedoring work on these ships is performed by Matson Terminals, Inc., at Berth 208, Terminal Island, California. The contract between Cal Cartage and the Japanese shipping lines is nonexclusive and terminable on written notice. The containers and chassis (the devices on which the containers are handled over the road) used by Cal Cartage are owned by the respective shipping lines. The employees of Cal Cartage are represented by the Teamsters.

PMT, which is engaged in the trucking business in several western states has, since about 1960, been engaged in the operation of container freight stations for shipping line customers which ship containers through Matson Terminals facilities in the Port of Los Angeles. It has 25 employees regularly hired to perform stuffing and unstuffing in Los Angeles and on occasions has hired as many as 35 additional casuals on a daily basis to supplement its regular

work force in the stuffing and unstuffing of containers. PMT first performed some of Matson Navigation's container freight services under a letter agreement dated August 19, 1958. The letter agreement of August 19, 1958 was supplemented by a contract between PMT and Matson Navigation dated June 16, 1960. The agreement of 1960 was supplemented by agreements dated November 1, 1961, August 23, 1962, and October 2, 1967. Commencing in June 1962 the services performed by PMT for Matson Navigation and the rates for those services were covered by tariffs filed by PMT with the Interstate Commerce Commission. Since 1967 PMT has performed container freight station services for the NYK and Showa Shipping Lines in addition to the services performed for Matson Navigation. Contracts with these companies are terminable on 30 days' notice and are nonexclusive. The PMT employees are represented by the Teamsters.

INTERNATIONAL CARGO and RICHMOND EXPORT are two companies engaged in container stuffing and unstuffing at facilities located in Richmond, California. These two companies (along with a third—Richmond Transfer and Storage Co.) have a common ownership, the same officers, and are subject to common direction and policy. These companies are engaged in export packing and preservation, public warehousing and local cartage, manufacturing of shipping crates, performance of Bay Area operations for interstate freight forwarders, intrastate moving of household goods and personal effects and the stuffing and unstuffing of containers. The Richmond facilities have been licensed as off-dock container freight stations and the companies began their container freight station operation in 1963. Their employees are represented by the Teamsters.

The LOS ANGELES CONTAINER TERMINAL, herein LACT, is a California corporation which was formed by Mitsui, K-Line, Y-S Lines, Japan Lines and their United States agents, exclusively to perform terminal and stevedoring services for some of the container operations of these lines. LACT began operations in November of 1968 and performs no stuffing or unstuffing of containers, but is confined to the loading and discharging of containers from vessels operated by the four Japanese lines that formed the corporation. LACT is a member of PMA and employs 50 members of the ILWU-PMA unit, some of whom work as steadies and the remainder are referred, or dispatched daily, as casuals.

2. The Disputed Contract

The Respondent Unions have continuously represented the longshoremen and the clerks on the Pacific Coast for many years and at least since 1961 both types of workers have been covered under the ILWU-PMA Pacific Coast Longshore and Clerks' Agreement or Document. (PCLCA or PCLCD).

According to the testimony of John MacEvoy, who is the area manager for the Southern California area of PMA, in 1960 the parties reached agreement on what is described as the Modernization and Mechanization Agreement, or M & M Agreement. The heart of the agreement was that the Union agreed to divest itself of make work, featherbedding practices that had plagued the industry for many years and the member companies obtained the right to introduce new methods

and equipment which would increase productivity and reduce turnaround time of vessels in port by improving and speeding up the methods of handling cargo. The agreement provided that the longshoremen were to have jurisdiction over the operation of any new equipment. The agreement was to run for 5 years and PMA agreed to contribute a total of 29 million dollars to the Mechanization Fund during the five-year period. The fund was intended to be used in three ways; as a pension augmentation; a vested benefit to be paid on retirement for a man who had been registered in the industry at the start of the fund; and as an unemployment fund which was to offset any unemployment impact on the West Coast due to the introduction of revolutionary new methods of cargo handling. At the expiration of the first five-year period it was extended for an additional five-year period (until June 30, 1971) and PMA agreed to contribute an additional 34½ million dollars to the Mechanization Fund over the new five-year period.

During the life of the latter agreement, Respondents in January, 1970, entered into an agreement known as the Container Freight Station Supplement which provided, *inter alia,* that all container freight station work, other than shippers' loads and door-to-door deliveries, was to be brought to the dock or areas adjacent to the dock and to be performed by longshore personnel.[10] A transition period was provided to cover

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[10]A shipper's load or door-to-door load is a container that has been stuffed or packed by the manufacturer or owner consignor, generally at a point a considerable distance from the harbor or port, and which is to be loaded directly aboard the ship and moved directly to the purchaser or owner consignee. This type of container load was not brought into this dispute. We are herein primarily concerned with the less than full container load (frequently referred to as an LCL or LTL) which is a container whose contents have more than one consignee and generally more than one owner consignor and by necessity must be packed, or stuffed (or if inbound unpacked or unstuffed) at a point very near the point or wharf where the ship will be moored or berthed.

the expiration date of existing contractual arrangements that PMA member companies might have with non-bargaining unit members "plus the additional necessary time to build, lease, or provide for a new facility or expansion of present facilities if such is required."[11]

On or about February 10, 1972, the Respondents entered into a memorandum of understanding, which memorandum was ratified by the parties, providing for a number of changes to the 1970-71 Container Freight Station Supplement.[12] The changes were to become the new Pacific Coast Longshore and Clerks' Agreement and the new agreement was to run through June 30, 1973. It is the new language that provided the basis for the alleged violations as set forth in cases herein numbered 111, 112 and 116. (See footnote No. 1, *supra*). On May 24, 1972, the Respondents entered into an agreement which in effect nullified the February 10, 1972, negotiated changes in the Container Freight Station Supplement and substituted therefor the provisions of the earlier Container Freight Station Supplement.[13]

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[11]See Appendix B attached hereto, reflecting the most pertinent and relevant language taken from the 1970 Container Freight Station Supplement. The entire contract supplement is General Counsel's Exhibit 2C.

[12]The most pertinent changes are attached hereto as Appendix C. The entire memorandum of understanding is set forth in the record as Appendix A to General Counsel's Exhibit 3.

[13]This substitution of language was apparently a tactical maneuver by the Respondents. On May 16, 1972, United

(This footnote is continued on next page)

3. The Work History

The extensive testimony leaves no doubt that employees of the charging parties—PMT, Cal Cartage, International Cargo and Richmond Export—have, over the years, prepared cargo preliminary to loading aboard ship. This preparation included early forms of unitizing or banding together, or placing in some type of small box or container, all for the convenience of getting the material to the shipping line and, after reaching its final destination, to the consignee. The same is true for the employees and members of Respondents. From the late forties until 1960 the motor carrier personnel unloaded their unitized or palletized loads from the trucks and then removed the load from the pallet and placed the merchandise on the "skin of the dock." The longshoremen then placed the merchandise on their pallets and moved the pallets to ship side for loading aboard ship. In cases of inbound cargo the process was reversed. The Modernization and Mechanization Agreement cured this type of make-work practice. In 1961 an attempt was made by Respondent PMA to assign the work of loading and unloading trucks at the marine docks to longshoremen. Following a strike by the Teamsters the dispute was resolved, recognizing that such work was

States District Judge for the Central District of California, Jesse W. Curtis, granted a temporary injunction banning enforcement of the pertinent provisions of the 1972 Container Freight Station Supplement, Civil No. 72-892-JWC. On May May 24—as noted in the text above—the Respondents reverted to the old language. However, on June 15, 1972, the Court issued an order amending the May 16, 1972 order to specifically enjoin Respondents' enforcement of the provisions put into effect on May 24, 1972. *Johansen v. International Longshoremen's and Warehousemen's Union, et al.*, USDC CD Calif., Civil No. 72-892-JWC, June 15, 1972.

that of the Teamsters.[14] The evidence is clear that both longshoremen and teamsters (or non-longshoremen) have, over the past years, engaged in the "work" of preparing merchandise for loading aboard ship. The marine clerks and the longshoremen, at least on the basis of this record, have exclusively performed the "work" of loading and unloading the merchandise aboard the ship. The I.L.W.U. marine clerks render services for the terminal operator and these services might be described as the "paper work" or "book work" necessary to keep accurate records on just what is being shipped by whom. The I.L.W.U. longshoremen render services for the stevedoring company and are primarily engaged in the loading and unloading of the ship.

4. The Containerized Ship

The increase in size of the containers into which the cargo or merchandise is placed has been a gradual process. Keeping pace with this increase in container size has been the development of equipment capable of lifting or handling the larger containers. As these containers have grown larger it has revolutionized the shipping industry and resulted in fully containerized ships. The forerunner of such type ships was the *Hawaiian Citizen,* owned by Matson Navigation, and placed in service in 1959. The *Hawaiian Citizen* had been a conventional vessel, but was modified to carry a deck load of containers in addition to regular freight.

From that beginning the conversion to fully containerized ships has been rapid and the following was stipulated by the parties (General Counsel's Exhibit

[14]See P. 171 of General Counsel's Exhibit 2A.

No. 2, paragraph 19). Many PMA member steamship companies were, by December 1969 or prior thereto, and continuing to date, in the process of phasing out their use of conventional or "break bulk" cargo vessels and replacing them with fully containerized vessels. Some companies have eliminated a high proportion of their conventional type vessels while other companies continue to operate such vessels, either handling containers in the deck or in the square of the hatches of those vessels or using modified vessels that are container vessels in part and conventional vessels in part. Among the lines that have acquired vessels and other facilities for fully containerized operations are Matson Navigation Company (Matson Navigation), Sea Land, Sea Train, Japan Line (J-Line), Kawasaki Kissen Kaisha, Ltd. (K-Line), Mitsui Osk Lines, Ltd. (Mitsui), Yamashita-Shinnihon Steamship Company, Ltd. (Y-S Lines), Nippon Yusen Kaisha (NYK Lines), American President Lines, Pacific Far East Line, American Mail Line, Johnson Line, and States Line. Other PMA member steamship companies are in the process of converting to fully containerized operations.

This development led to the growth of Container Freight Stations. At the time the *Hawaiian Citizen* first docked in Los Angeles the only Container Freight Station in operation in the area was the PMT Container Freight Station at Wilmington, California, where non-longshoremen were employed to stuff and unstuff containers. PMT employees stuffed and unstuffed Matson's containers under a tariff (schedule of rates to be charged) issued by Matson covering container freight station work. The number of container freight stations has grown and various motor carrier employees perform stuffing and unstuffing services at these stations. In

the late 1960's Respondent Local 13 entered into agreements with three companies covering the work of stuffing and unstuffing containers, but these agreements were separate and distinct from the ILWU-PMA master agreement, or the PCLCA, and the employees were not a part of the longshore work force, but were called terminal warehousemen. It was not until after the execution of the Container Freight Station Supplement, that is the basis of this dispute, that employees coming within the purview of the PCLCA began rendering container freight station services. Under this factual situation, it can not be said that the stuffing and unstuffing of today's huge sophisticated containers is work historically or traditionally done by the Respondent Unions.

Respondents' Arguments

1. The growth of the small boxes or strapped pallets to today's 20 foot to 40 foot containers has been a gradual evolution and the work of stuffing and unstuffing these containers is traditional and historical work of longshoremen.

2. The disputed language is clearly addressed to the labor relations of the employer, PMA, viz-a-viz its own employees, the longshoremen and clerks.

3. The contracting Respondents have only sought to preserve or recapture that work which has traditionally and historically been performed within the bargaining unit.

4. The work of stuffing and unstuffing containers is "fairly claimable" and may properly be the subject of work preservation clauses quite apart from historical or traditional work considerations.

The Arguments of General Counsel and Charging Parties

1. The stuffing and unstuffing of modern day containers is not historically or traditionally work of longshoremen.

2. The Container Freight Station Supplement language seeks to reach out and acquire, or "capture", new work for employees in the ILWU-PMA bargaining unit.

3. The disputed clauses of the Container Freight Station Supplement are Union signatory clauses that would require non ILWU-PMA bargaining unit employers to join PMA and their employees to join the Respondent Unions.

Analysis[15]

As was indicated by the Supreme Court in *National Woodwork, supra,* a determination of whether the Container Freight Supplement (more specifically the clauses set forth in the attached Appendix B & C) and its enforcement violated Section 8(e) and Section 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the objective was preservation of work for longshoremen, or whether the agreement was tactically calculated to satisfy objectives elsewhere. If the latter is the case, the Charging Parties are neutral bystanders and the agreement and its enforcement become secondary.

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[15]While the language of *National Woodwork, supra,* seems clear and concise, the application is extremely difficult. In the instant case opposing counsel cited, analyzed and argued the same cases as support for opposing views. See also the September 18, 1972 Analysis section of LRRM, Vol. 81, No. 5.

There need not be an actual dispute with the secondary employer, here the Charging Parties, for the activity to fall within this category, so long as the tactical objective of the agreement and its maintenance is that employer. "The touchstone is whether the agreement is addressed to the labor relations of the contracting employer vis-a-vis his own employees."

In this case I can not conclude that the thrust of the Container Freight Station Supplement is directed toward the labor relations of the employer's present employees, but rather it appears to be directed toward the Union's concern to enlarge its membership and acquire work now being performed by non-longshoremen. I reach this conclusion based on an analysis of the work covered by the disputed contract language in light of the work customarily performed by the unit employees here seeking its protection, as well as the evidence of who is currently performing the work.

As indicated *supra* the traditional and historical role of the longshoremen is that of loading and unloading the cargo aboard ship. I can not equate the preparatory work of stuffing or unstuffing containers with loading or unloading cargo aboard ship. LACT was formed by four Japanese shipping lines and their United States Agents. LACT performs terminal and stevedoring services exclusively for the four Japanese shipping lines, all of which are members of PMA. But ever since operations of LACT commenced in November of 1968 Cal Cartage has performed the container freight station

work for three of the four Japanese lines at Cal Cartage's Wilmington facility. Thus, to paraphrase the Board in its recent *U. S. Naval Supply Center* case,[16] the employees (at the Cal Cartage Wilmington Container Freight Station) have never been part of the work unit covered by the Container Freight Station Supplement between Respondent PMA and Respondent Unions. Nor has the precise work which is the focus of the dispute herein ever been performed by employees working under that agreement. The sole function of the shipowners with respect to such work historically has been the receiving and transshipping of cargo to designated ports; that of the stevedoring companies, the loading and unloading (aboard the ship) of cargo delivered to them for that purpose. The ILWU's real dispute is thus with Cal Cartage. The Respondent Unions' real demands can only be met if Cal Cartage were to replace its own employees, now represented by Teamsters, with longshoremen. The fact that the Container Freight Station Supplement "upon which Respondents rely as being work preservation clauses, may in other circumstances have valid work preservation objectives, does not mean that they can be used as a shield for conduct aimed not at work preservation but at acquisition of work historically performed by employees in another work unit."[17]

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[16] *International Longshoremen's Association, AFL-CIO, et al. (U. S. Naval Supply Center)*, 195 NLRB No. 41, 79 LRRM 1289.

[17] *U.S. Naval Supply Center, supra,* citing *Intercontinental Container Transport Corp. v. New York Shipping Association,* 426 F. 2d 884 (C.A. 2).

What has been related with respect to Cal Cartage and their operation of a container freight station is equally true of the Charging Parties PMT, International Cargo and Richmond Export. PMT first performed some of Matson Navigation's container freight services under a letter agreement dated August 19, 1958, a copy of which appears as part of an all party stipulation (General Counsel Exhibit No. 2 S(1)). This letter agreement has been followed by subsequent agreements (General Counsel Exhibits No. 2 S(2)(3)(4) and (5)). Additionally PMT has rendered substantial container freight station services for NYK and Showa lines. International Cargo and Richmond Export have operated off-dock container freight stations since 1963 with non-longshore personnel. The language of the PMA-ILWU Container Freight Station Supplement seeks, under the guise of work preservation, to reach out and take the "work" which has been performed by non-longshoremen at container freight stations and place it in the hands of longshoremen. While the 1972 supplement is worded somewhat differently than the 1970 Container Freight Station Supplement, the tax or fine levied against PMA members for handling containers stuffed, or to be unstuffed by non-ILWU members is coercive and it seeks to preserve the same wrongful objective as was accomplished in the 1970 supplement. I find therefore that the Container Freight Station Supplement—particularly the language therefrom attached hereto as Appendix B (for the 1970 agreement) and Appendix C (for the 1972 agreement)—to be an agreement whereby the employer, Respondent PMA, has contracted with a labor organization, Respondent Unions, to cease doing business with another person, in this instance Cal Cartage, PMT, Inter-

national Cargo and Richmond Export, and that such contract is to such extent unenforceable and void.[18]

Respondents argue that even if it is found the clauses in question are not work preservation clauses, in any event the work involved is "fairly claimable" and within the meaning of *Wilson and Co.*,[19] and thus should be found valid. That longshoremen have the capacity or know-how to do the work can not be denied. They have done the same kind of work that is in dispute. But *the work* the Respondent Unions now seek by requiring that all container freight station work be done by ILWU members is not recapture of work—in my opinion—but work acquisition. The evidence shows that the Container Freight Station Supplement was negotiated to acquire work for the entire Pacific coastwide bargaining unit. As already indicated the primary work which the unit employees here perform is considerably more limited than that which they seek to preserve. The traditional and historical work of the unit has been to load and unload cargo aboard ship. As the Board indicated in *Fortunato, supra,* the fact that the "stuffing" of a container off the dock may require the same skills or knowledge as "stuffing" a container on the dock is not persuasive that all container loading is therefore "fairly claimable" by the ILWU. This is particularly true where *the work* which the disputed contract would take away from non-ILWU members, has never been performed by longshoremen.

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[18]See *Local 282, (Fortunato)*, 197 NLRB No. 124, and the many cases cited therein.

[19]*Meat and Highway Drivers, Local 710 [Wilson and Co.] v. N.L.R.B.*, 335 F. 2d 709 (C.A.D.C.).

The conclusion seems inescapable that both Respondents must have foreseen secondary consequences within Section 8(e)'s intendment would flow from the Container Freight Station Supplement to the PCLCA in view of the economic history, circumstances of the industry, size of the unit and the extent to which the disputed work has always been done outside the unit.[20] And I so find.

The Respondents argue most persuasively that the Container Freight Station Supplement clauses are work preservation clauses like those involved in *National Woodwork, supra,* which had been implicitly recognized as a mandatory subject of collective bargaining in the area of subcontracting out of work performed by members of the *bargaining unit* by the Supreme Court in the *Fibreboard* decision.[21] This case does not turn on a similar factual situation and as already indicated is more nearly analogous to the facts of *U.S. Naval Supply Center, supra.* I am of the opinion that the *dispute work*—stuffing containers at the Cal Cartage Container Freight Station—has never been performed by ILWU members.

However, this raises the whole question of the work of the *bargaining unit* and whether or not individual member companies of an otherwise appropriate bargaining unit within the meaning of Section 9(c) of the Act may become secondary employers if and when the skills, or work to be performed, are so widely variant from company to company. As has been noted, there are three types of companies that are members

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[20]*Wilson and Co., supra.*

[21]*Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964).

of PMA—shipping companies, terminal companies and stevedoring companies. The geographical area of the unit is the entire Pacific Coast (California, Oregon and Washington). The primary work performed by the employees on the ship is unrelated to that performed by the terminal or stevedoring employees. The skills employed by the terminal employees are quite different from those of the stevedoring company employees, although the act of accomplishing their common task of getting the cargo aboard ship is, of course, closely related. Under these circumstances, and particularly where as in the instant case some PMA members may not employ longshoremen, General Counsel argues that the Container Freight Station Supplement clauses exceed a *primary* work preservation aim and cites *Old Dutch Farms, Inc.*[22] wherein the involved employers were members of the same multi-employer *bargaining unit,* but the court said at page 32: "the integration of Balsam and Old Dutch operations on a merely functional plane is an improper basis for concluding that both have primary employer status under the secondary boycott provisions." The court goes on to say, "Since the object of every secondary boycott is really to cause a cessation of business between two independent companies, the Labor Act's prohibitions would be nullified if a union were allowed to claim that the very business relationship it seeks to end makes both parties 'primary' employers." While I have not elected to decide this case on the above-related argument, I nevertheless am of the opinion that it is possible to have secondary and primary employers within the same multi-employer appropriate

[22]*Milk Drivers and Dairy Employees, Local 584,* 146 NLRB 509, enfd. 341 F. 2d 29.

bargaining unit. Where the multi-employer group is one of mixed disciplines and widely variant work functions, the holding in *Dixie Mining Co.*,[23] that "the 'unit' for which subcontracting clauses may lawfully seek to preserve work are units appropriate for collective bargaining within the meaning of Section 9 of the Act," would seem to be extremely broad and not to be applied in every situation.

Section 8(b)(4) Issues

Having found the Container Freight Station Supplemental Agreement to be violative of 8(e), I now turn to a consideration of whether Respondent Unions' conduct in seeking to compel its execution and/or implementation violated 8(b)(4)(i) and (ii)(B) of the Act.

The following was stipulated to by all parties.

Respondent International Union sent a letter to the various locals on or about June 14, 1971, which in part read:

> The rest of the program of action as report to the last longshore caucus, namely to see that all containers not stuffed by the registered work force will not be loaded aboard ship after 12:01 a.m. June 30, 1971 unless such loads fall under the exception of manufacturers' loads, military cargo, door-to-door delivery or pickup (domestic trade) remain in effect.

On or about June 17, 1971, said letter was published in the official publication of Respondent International,

[23]*International Union, United Mine Workers of America (Dixie Mining Co.),* 165 NLRB 465 at 468.

"The Dispatcher", and copies of "The Dispatcher" were mailed to the various locals and distributed to their members. On or about June 24, 1971, Respondent Local 13 published in its official publication, "Bulletin," an article, a portion of which read as follows:

> THE PROGRAM OF NOT WORKING CONTAINERS ON JUNE 30, 1971—OTHER THAN THOSE STUFFED AND UNSTUFFED BY LONGSHOREMEN, AND THE EXCEPTIONS OUTLINED IN THE CONTRACT, IS STILL IN EFFECT. EXCEPTIONS: Manufacturers' regular type Loads & Shippers' Loads.

Copies of the "Bulletin" containing the above item were distributed to the members of Respondent Local 13.

Mr. Jeffery Amos, night stevedore superintendent for LACT on June 29, 1971, whose testimony was not contradicted, testified that on the late evening of June 29, 1971, at about 11:30 or 11:45, John Pandora, president of Respondent Local 13, and Joe Argentio, vice president of Respondent Local 13, came to LACT and instructed the marine clerks and longshoremen employed by LACT that as of 12:01 a.m. June 30, 1971, containers stuffed by non-ILWU personnel were not to be accepted or loaded aboard vessels at LACT, unless the containers were shippers' loads. Containers to be unstuffed by non-ILWU personnel were not to be made available for pickup. Thereafter the ILWU clerks requested copies of the container load plan. (The load plan showed the container number, port of discharge, port of loading, point of loading, shippers, consignees, weight, cube and seal number.)

Mr. Chodzko, vice president of Cal Cartage, testified that he was called to LACT at about 9:50 a.m. on June 30, 1971, and there learned that LACT was refusing to accept a Cal Cartage stuffed container. Mr. Chodzko further testified he talked by telephone with two men who identified themselves as Mr. Pandora and Mr. Jackson, president of Respondent Local 63, and that they informed him that in accordance with the contract language contained in the Container Freight Station Supplement, "they would not allow the container to be received by L.A. Container Terminal." According to Chodzko, Pandora and Jackson were careful to point out that "your beef is with LACT and not with us." Thereafter Chodzko requested Mr. Charles Brown, manager of LACT, to direct the marine clerk to receive the container. According to Chodzko, Mr. Brown replied, "I wish you wouldn't make me do this because if I do the entire longshore group will walk off the ship and he will close us down." Thereafter at the suggestion of his attorney, Mr. Chodzko directed the container to be returned to the Cal Cartage Container Freight Station and no further attempt was made to deliver containers stuffed by Cal Cartage employees.

A similar refusal by the ILWU clerk at Consolidated Marine Terminal to handle inbound containers for pickup by Cal Cartage non-longshore personnel to be delivered to the Cal Cartage warehouse on the morning of June 30, 1971, was related by Perry Luallin, a truck driver for Cal Cartage. I credit his testimony and regard the incident as a violation of the Act, but have not analyzed this incident in great detail herein, because it is not necessary for my decision and would not alter my remedy and order.

Accordingly, I find that Respondent Unions did induce and encourage the employees of PMA in the course of their employment to refuse to handle the containers stuffed by Cal Cartage with an object of forcing the PMA member companies to cease doing business with Cal Cartage, thereby bringing pressure to bear on Cal Cartage to displace its own employees engaged in stuffing and/or unstuffing containers at its Container Freight Station with ILWU members, and in so doing Respondent Unions violated Section 8(b)(4)(i) and (ii)(B) of the Act.[24]

Upon the basis of the foregoing findings and the entire record in the case, I make the following:

Conclusions of Law

1. Pacific Maritime Association and its many member companies and the Charging Parties, California Cartage Company, Inc., Pacific Motor Trucking Company, International Cargo Services, Inc., and Richmond Export Services, Inc., are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent Unions are labor organizations within the meaning of Section 2(5) of the Act. John Pandora and Joe Argentio are agents of Respondent Unions within the meaning of Section 2(13) of the Act.

3. By entering into, maintaining and enforcing the provisions of the Container Freight Station Supplement as negotiated between Respondent Unions and Respondent PMA, wherein Respondent PMA agreed to cease doing business with other persons, including Cal Cartage, PMT, International Cargo and Richmond Export, Respondents and each of them have engaged in unfair labor practices within the meaning of Section 8(e) of the Act.

4. By inducing, encouraging and restraining PMA and its member companies with an object of forcing or requiring them to cease doing business with Cal Cartage, Respondent Unions have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found Respondent Unions and Respondent PMA to have engaged in certain unfair labor practices in violation of Section 8(e) and the Respondent Unions to have engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend that each Respondent cease and desist from the proscribed conduct and take certain affirmative action of the type which is conventionally ordered in such cases which I find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[25]

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[24] *International Association of Heat and Frost Insulators and Asbestos Workers (Westinghouse Electric Corp.)*, 193 NLRB No. 4; and *National Woodwork, supra.*

[25] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National

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ORDER

1. Respondent Unions, International Longshoremen's and Warehousemen's Union, and Locals 10, 13, 34 and 63 of the International Longshoremen's and Warehousemen's Union, their officers, agents and representatives, shall:

(a) Cease and desist from:

(1) Entering into, maintaining, giving effect to or attempting to implement in any way the Container Freight Station Supplemental Contract to the master agreement known as the Pacific Coast Longshore and Clerks' Agreement between the PMA and the ILWU to the extent and in the manner said agreement has been found to be unlawful herein.

(2) Threatening, coercing, restraining, inducing or encouraging PMA or any of its member companies, or any other person engaged in commerce, or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Cal Cartage, or any other person.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify members of the International Longshoremen's and Warehousemen's Union[26] that Respond-

Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[26]While Locals 10, 13, 34 and 63 of the ILWU were specifically named in these consolidated cases, I shall not direct that those locals take any specific affirmative action which might tend to set them apart from all other International Longshoremen's and Warehousemen's Union locals. Because Respondent International Union negotiated the PCLCA master

ent Unions have no objections to loading or unloading containers that have been stuffed, or are to be unstuffed by employees of Cal Cartage, PMT, International Cargo, and Richmond Export, or any other employer utilizing non-ILWU members in the performance of these duties.

(2) Notify all members of the International Longshoremen's and Warehousemen's Union that any previous instructions, requests, or appeals which Respondent Unions may have made against loading or unloading containers not stuffed, or to be unstuffed, by other than ILWU members have been withdrawn and are to have no force and effect.

(3) Notify all members of the International Longshoremen's and Warehousemen's Union that any and all of the paragraphs contained in the Container Freight Station Supplemental Agreement negotiated by and between PMA and ILWU which limit, restrain, restrict, tax, or prohibit handling in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(4) Post at their business offices, meeting halls and all dispatch halls copies of the attached notice marked Appendix D.[27] Copies of said notice, on

agreement, as well as the Container Freight Station Supplement, the conduct required on behalf of the International should result in corrective action being taken by *all* locals.

[27]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDERS OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN

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forms provided by the Regional Director for Region 21, after being duly signed by a representative of Respondent International Union, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Unions to insure that said notices are not altered, defaced, or covered by any other material.

(5) Furnish said Regional Director with signed copies of the aforesaid notice for posting by California Cartage Company, Inc., Pacific Motor Trucking Company, International Cargo Services, Inc., and Richmond Export Services, Inc., or such of said employers as may be willing, at all places where notices to their respective employees are customarily posted.

(6) Notify the Regional Director for Region 21, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent Unions have taken to comply herewith.[28]

2. Pacific Maritime Association, of San Francisco, California, its officers, agents, successors and assigns, shall:

(a) Cease and desist from entering into, maintaining, enforcing or giving effect to any or all of those sections of the Container Freight Station Supplemental Agreement negotiated by and between PMA and ILWU

ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[28]In the event that this recommended Order is accepted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith."

which restrict, restrain, limit, tax or prohibit handling in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify all company members of the Pacific Maritime Association, that any previous instructions, requests or appeals which Respondent PMA may have made against loading or unloading containers that have been stuffed, or are to be unstuffed, by non-ILWU personnel are to be withdrawn and to have no force and effect.

(2) Notify all company members of Pacific Maritime Association that any and all provisions of the Container Freight Station Supplement which has been negotiated between the PMA and ILWU which restrain, restrict, limit, tax or prohibit handling in the customary manner containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(3) Mail to each of their member companies and post at their main office in San Francisco and at each area office copies of the attached notice marked Appendix E.[29] Copies of said notice on forms provided by the Regional Director for Region 21, after being duly signed by Respondent PMA's representative shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter in conspicuous places including all places where notices to member companies are customarily

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[29]See footnote 27.

posted. Reasonable steps shall be taken by Respondent PMA to insure that said notices are not altered, defaced, or covered by any other material.

(4) Notify the Regional Director for Region 21, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent PMA has taken to comply herewith.[30]

Dated:

/s/ James T. Rasbury
James T. Rasbury
Administrative Law Judge

[30]See footnote 28.

Decision and Order.

United States of America, Before the National Labor Relations Board.

International Longshoremen's and Warehousemen's Union; Local 13, International Longshoremen's and Warehousemen's Union; and Local 63, International Longshoremen's and Warehousemen's Union (California Cartage Company, Inc.) and Robert A. Curry, International Longshoremen's and Warehousemen's Union; Local 13, International Longshoremen's and Warehousemen's Union and Local 63, International Longshoremen's and Warehousemen's Union, Respondent Union and Pacific Maritime Association, Respondent Employer and California Cartage Company, Inc. and Pacific Motor Trucking Company, Charging Parties, International Longshoremen's and Warehousemen's Union; Local 10, International Longshoremen's and Warehousemen's Union; and Local 34, International Longshoremen's and Warehousemen's Union, Respondent Unions and Pacific Maritime Association, Respondent Employer and International Cargo Services, Inc. and Richmond Export Services, Inc., Charging Parties. Case 21-CC-1326, Cases 21-CE-103, 21-CE-112, Cases 21-CE-109, 21-CE-111, Case 21-CE-116.

DECISION AND ORDER

On October 19, 1972, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, General Counsel, Respondent Pacific Maritime Association,[1] the International Longshoremen's and Warehousemen's Union[2] and its

[1]Hereafter referred to as PMA.
[2]Hereafter referred to as ILWU.

Locals, and Charging Parties California Cartage Company, Inc., and Pacific Motor Trucking Company,[3] filed exceptions and supporting briefs. The General Counsel, Respondents PMA and ILWU, and Charging Parties PMT and California Cartage Company, Inc., also filed answering briefs. Charging Party PMT filed a motion to strike the two briefs filed by Respondent which pertain to other cases beyond the records herein, and Respondent ILWU filed a motion for oral argument.

On September 13, 1973, oral argument was heard before the Board[4] in the instant cases and in Cases 21-CD-298, 21-CD-308, 21-CD-314, in which the General Counsel, Charging Parties California Cartage Company, Inc., and PMT, and Respondents PMA and ILWU participated. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 692, also participated.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and oral argument and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as herein modified.[5]

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[3]Hereafter referred to as PMT.

[4]Without objection from any of the parties Board Member Howard Jenkins, Jr., then nominated for reappointment, but not yet confirmed by the Senate, was invited to sit with the Board during oral argument.

[5]Finding merit in certain of the General Counsel's exceptions, we hereby correct the following errors in the Administrative Law Judge's Decision:

(1) The Administrative Law Judge stated that the container stuffing done by California Cartage consisted of less than container loads. The record discloses, however, that a great amount of the stuffing done by this firm consists of "straight" loads, which are large lots of cargo on a single bill of lading which completely fill one or more containers.

(2) The Administrative Law Judge apparently inadvertently held that if the agreement involved herein was tactically calculated to satisfy objectives elsewhere, the Charging Parties are neutral bystanders, i.e., the secondary employers. In fact, he should have stated that under those circumstances PMA and its member companies would be the neutral bystanders.

(3) Further corrections have been made to the Conclusions of Law, the Order, and the Appendixes to reflect errors pointed out by certain exceptions of the General Counsel, including the deletion of Locals 10 and 34 of the ILWU from findings or orders concerning the 8(b)(4) violations.

The facts in these consolidated cases are not in dispute. Respondent PMA and Respondent Unions have a long history of collective bargaining covering longshoremen and marine clerks. Since 1961 these employees have been represented under the ILWU-PMA Pacific Coast Longshore and Clerks' Agreement or Document (PCLCA or PCLCD). In 1960, the parties negotiated and adopted a Modernization and Mechanization Agreement. This Agreement recognized for the first time that technological advances had seriously diminished available work for longshoremen and attempted to accommodate the legitimate interests and needs of both parties in the Pacific coast shipping industry. Under the Agreement PMA members gained the right to use new equipment to increase productivity and improve methods for handling cargo. In the future, nonlongshoremen delivering merchandise to the dock would not be required to place the cargo on the "skin of the dock" to be reloaded by longshoremen on other pallets for loading aboard ship. It was agreed that the Union would divest itself of this type of work and longshoremen would load truckers' pallets with the merchandise directly on the ship. Cargo could

be unitized in one way or another—boxed, crated, banded, glued, or palletized in large or small containers. The idea was to move the cargo in the safest and most efficient manner on or off the ship. To accomplish this objective new and improved winches and cranes became standard equipment. Moreover, at this time the process of containerization, the method whereby bulk cargo is placed in large containers, 8 by 8 by 20 or 40 feet or larger, was in its infancy and growing. Matson Navigation Company, a member of PMA, had already converted one of its freighters[6] in 1959 to carry a deckload of containers in addition to conventional cargo in its hold. While the record shows that longshoremen exclusively have always performed the actual work of loading and unloading merchandise, however contained, on and off ships, it is also clear that preparing cargo for shipment in various types of containers is work that had been performed over the years by teamsters and other employees as well as longshoremen.

In return for the Union's relinquishment of make-work practices, it was further agreed in the 1960 Agreement that the operation of all new equipment on the docks would be performed by longshoremen and, in addition, members of PMA would establish a mechanization fund of $29 million, subsequently augmented by another $34.5 million, to be used in support of longshoremen's pension, retirement, and unemployment.

During the early part of the 1960's, this compromise apparently worked to the satisfaction of the ILWU

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[6]Referred to in the record as *Hawaiian Citizen* or *Hawaiian Merchant*.

and PMA. At the same time, however, and with increasing acceleration, shipping companies began to adopt, some exclusively, the new method of transporting cargo known as "containerization." The use of boxes or bundles on or off pallets became a less desirable and uneconomical method of handling cargo in the new technology. Following the lead of Matson, other steamship companies converted their vessels to carry containers or constructed new ships solely for that purpose. Obviously, the larger and more self-contained the load, the less work for longshoremen to load or unload the ship and, as a parallel, the less time in port for the ship, with substantial savings to the shipping industry.

As indicated above, the modern container is a large enclosure 20 feet or more in length designed to fit into the slot of a containerized ship, or on the chassis of a truck, or piggyback on a train. The development of this method of carrying freight gave rise to the establishment of container freight stations. From the beginning shipping companies, members of PMA and owners of the containers, have contracted with trucking firms to stuff and unstuff some of these containers with merchandise from shippers or to consignees. These trucking firms, such as California Cartage and Pacific Motor Trucking, the Charging Parties in several of these cases, employ drivers and warehousemen represented by the Teamsters.

As the decade of the 1960's neared its end, the ILWU was concerned at the loss of longshore work to an extent not contemplated in the 1960 Agreement, and therefore sought and obtained from PMA the so-called Container Freight Station Supplements to their

collective-bargaining contract. These Supplements were executed on January 5, 1970, and February 10, 1972, and provided, in effect, that all stuffing and unstuffing of containers to be loaded or unloaded from ships docking in Pacific coast ports, except for shippers' loads and door-to-door deliveries, was work to be performed by ILWU members. The intent of the 1970 Supplement was to bring container work "to the dock or to areas adjacent to the dock on or before June 30, 1971." This would require shipping companies to cease subcontracting container stuffing work to employers who did not employ ILWU members and to establish, if necessary, their own container freight stations on or adjacent to the docks within the work jurisdiction of the ILWU.

At issue in these cases is, first, the legality under Section 8(e) of the above contractual provisions and, second, the legality under Sections 8(b)(4)(i) and (ii)(B) of conduct by Respondent International and its Locals 13 and 63 in taking action to implement these provisions, as set forth in detail in the Administrative Law Judge's Decision.

The Board has considered Respondents' defense that the work of stuffing and unstuffing modern containers is work that falls into the category of unit work traditionally performed by members of ILWU within the multiemployer PMA unit and that their attempt to preserve or reclaim this work for ILWU-represented employees is primary, lawful activity under the Supreme Court's decision in *National Woodwork Manufacturers v. N.L.R.B.*[7] Although the loss of work on the docks, whether due to the use of large containers or other

[7]386 U.S. 612 (1967).

technological improvements, is certainly a matter of legitimate concern to the ILWU, we cannot agree with its legal position in these cases.

Initially, it is clear from the language of the Supplements that the ILWU's claim to container stuffing work is not limited to work generated by members of PMA, but extends broadly to all containers entering or leaving Pacific coast docks, whether or not the owners of the containers are members of PMA and statutory employers of employees within the longshore unit represented by ILWU. Obviously, as to those shipping companies, nonmembers of PMA using the Pacific coast docks to load or unload their containers, the statute does not permit a restrictive contract or a refusal to handle their containers to put pressure on them to cease doing business with trucking, cartage, or other companies which do not employ ILWU members.

With respect to Respondents' reliance upon *National Woodwork, supra,* that rule cannot be applied so broadly as to encompass all efforts by unions to enlarge the work opportunities for members of a bargaining unit adversely affected by technological advances. In that case the Court set forth its views in three opinions, of which Justice Harlan's concurring opinion established a majority of five to four. The main opinion cautioned that the test in determining the legality of a restrictive clause was not "simple" and must be made with full concern for "all the surrounding circumstances." Such circumstances were defined by the Court as including "the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the

employers who would be boycotted, and the economic personality of the industry."[8] Justice Harlan was careful to note that the case before him did not involve a restrictive contract or boycott to acquire for union members "work that had not previously been theirs."[9] Rather, it was a question of union carpenters seeking to continue their traditional practice of mortising, routing, and beveling blank doors on the jobsite before installation. In the context of these narrow facts, he held that Congress had not forbidden this method of meeting the economic problem arising from a changing technology. Four Justices, dissenting, held that the union's boycott of the prefitted doors fell clearly within "the express terms of the federal labor law."[10]

In *Fibreboard Paper Products Corp. v. N.L.R.B.*,[11] upon which Respondents further rely, the Court restricted its holding of a violation of Section 8(a)(5) in a question involving subcontracting to the facts of that case; i.e., "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment."[12]

In the instant case the record shows that the stuffing and unstuffing of containers, whether large or small, modern or pre-World War II, is work that has been performed both by longshoremen and by other employees, including teamsters employed by the Charging Parties. It may well be, as the ILWU contends, that

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[8]386 U.S. at 644, fn. 38.

[9]*Id.* at 648.

[10]*Id.* at 650.

[11]379 U.S. 203 (1964).

[12]*Id.* at 215.

the modern container is, in effect, part of a ship. But it is also true that the same container is part of a truck or perhaps a train. The traditional work of the ILWU has been to load and unload ships. To a large extent, the make-work rights claimed by longshoremen with respect to cargo placed on the dock were effectively bargained away in 1960. The contract made between the concerned employers and the ILWU in that year is of historic significance because it represented a new approach to the serious problem of employee displacement as a result of technological changes. In good-faith collective bargaining the parties recognized each other's vital interests in a bargain which accommodated themselves and the public. Instead of insisting that technological changes must be restricted, the Union agreed to progress which was, in any event, inevitable. The Companies, on the other hand, assumed responsibility for the economic consequences to union members in the loss of employment. If, indeed, as Respondents insist, longshore work has fallen to an unacceptable level, the way should be clear to the parties to resolve their differences without renewing old wars and illegally affecting the rights of other employers and their employees.

Respondents call to the Board's attention the fact that their Container Freight Station Supplements relate to only a small portion of the work of stuffing and unstuffing containers since shippers' loads, representing 85 percent of that work, are not included. The work of stuffing containers, however, does not change its essential character because it is performed by shippers rather than trucking company employees. Indeed, the evidence indicates that a substantial portion of the

work of California Cartage employees involves the stuffing of straight or full loads into containers as well as less than container loads. While the ILWU does not now seek all container work, the logic of its position is that it is legally entitled to all such work without regard to the identity of the competing employees. Obviously, a boycott to enforce a claim to stuff shippers' loads and door-to-door deliveries would have an enormous impact on the shipping industry. This circumstance, among others set forth above, clearly distinguishes this case from *National Woodwork, supra.* It is, moreover, a circumstance which, in accordance with the Court's *caveat* in that case, warrants the Board's full concern in determining the validity of the ILWU's claim of work preservation.

In reaching our decision in this case we find it unnecessary to pass upon or adopt the Administrative Law Judge's opinion that both secondary and primary employers may coexist in the same multiemployer bargaining unit. We reject the General Counsel's argument that members of PMA who do not directly employ longshoremen are neutral, secondary employers entitled to the protection of Section 8(b)(4) of the Act.

The ILWU's unit of longshoremen was found appropriate by the Board in 1938.[13] At that time the Board recognized and accepted the fact that not all members of the Waterfront Associations, predecessors of PMA, directly employed longshoremen. Nevertheless, the Board was cognizant then, as it is now, that employers in the shipping industry on the Pacific coast have a direct and vital interest in the terms and conditions

[13] *Shipowners' Association of The Pacific Coast,* 7 NLRB 1002 (1938).

of employment for longshoremen. The history of labor relations in that industry has been fraught with extraordinary problems, which have extended beyond the customary employer-employee relationship. As the Board pointed out in 1938, the statute defines the term "employer" to include any person acting as an agent for an employer "directly or indirectly." All members of PMA have given that agency the authority to act as their agent and PMA, in turn, is clearly the agent of employers employing longshoremen. In this particular industry the community of interest of the participating employers is unmistakable. We need not, however, and do not go beyond the facts of this case and this industry in holding that all members of PMA are, with respect to the ILWU, primary employers for the purposes of collective bargaining in the established unit of longshoremen and marine clerks.

On the basis of the foregoing, we find that by entering into the 1970 and 1972 Container Freight Station Supplements, Respondent PMA and Respondent Unions violated Section 8(e) of the Act.

Further, by their inducement and encouragement to the employees of PMA not to handle containers stuffed by non-ILWU labor, and their refusal to handle cargo in an attempt to implement the Container Freight Station Supplement, Respondents ILWU and its Locals 13 and 63 violated Section 8(b)(4)(i) and (ii)(B) of the Act.

Amended Conclusions of Law

Substitute the following for the Administrative Law Judge's Conclusion of Law 4:

"4. By inducing and encouraging individuals employed by PMA and its member companies to engage

in work stoppages or refusals to perform services in the course of their employment, and by threatening, coercing, and restraining PMA and its member companies with an object of forcing or requiring them to cease doing business with California Cartage, Respondent ILWU and its Locals 13 and 63 have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act."

The Remedy

Having found Respondent Unions and Respondent PMA to have engaged in certain unfair labor practices in violation of Section 8(e), and Respondents ILWU and its Locals 13 and 63 to have engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, we shall order that each Respondent cease and desist from the proscribed conduct and take certain affirmative action which we find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. Respondent Unions, International Longshoremen's and Warehousemen's Union and Locals 13 and 63 of the International Longshoremen's and Warehousemen's Union, their officers, agents, and representatives, shall:

(a) Cease and desist from:

(1) Entering into, maintaining, giving effect to, or attempting to implement in any way the Container

Freight Station Supplements to the master agreement known as the Pacific Coast Longshore and Clerks' Agreement between the PMA and the ILWU to the extent and in the manner said agreement has been found to be unlawful herein, or any other contract or agreement, express or implied, whereby PMA, on behalf of its member companies, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

(2) Threatening, coercing, or restraining PMA or any of its member companies, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with California Cartage, or any other person.

(3) Inducing and encouraging any individual employed by PMA or its member companies to engage in work stoppages or a refusal to perform services in the course of his employment, where an object thereof is to force or require such persons to cease doing business with California Cartage, or any other person.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify members of the International Longshoremen's and Warehousemen's Union that Respondent Unions have no objections to loading or unloading containers that have been stuffed, or are to be unstuffed, by employees of California Cartage, PMT, International Cargo, and Richmond Export, or any other employer utilizing non-ILWU members in the performance of these duties.

(2) Notify all members of the International Longshoremen's and Warehousemen's Union that any previous instructions, request, or appeals which Respondent Unions may have made against loading or unloading containers not stuffed, or to be unstuffed, by other than ILWU members have been withdrawn and are to have no force or effect.

(3) Notify all members of the International Longshoremen's and Warehousemen's Union that any and all of the paragraphs contained in the Container Freight Station Supplements negotiated by and between PMA and ILWU which limit, restrain, restrict, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(4) Post at their business offices, meeting halls, and all dispatch halls copies of the attached notice marked "Appendix A."[14] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by a representative of Respondent International Union, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent

[14]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Unions to insure that said notices are not altered, defaced, or covered by any other material.

(5) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Unions have taken to comply herewith.

2. Respondent Unions, International Longshoremen's and Warehousemen's Union and Locals 10 and 34, of the International Longshoremen's and Warehousemen's Union, their officers, agents, and representatives, shall:

(a) Cease and desist from entering into, maintaining, giving effect to, or attempting to implement in any way the Container Freight Station Supplements to the master agreement known as the Pacific Coast Longshore and Clerks' Agreement between the PMA and the ILWU to the extent and in the manner said agreement has been found to be unlawful herein, or any other contract or agreement, express or implied, whereby PMA, on behalf of its member companies, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify all members of the International Longshoremen's and Warehousemen's Union that any and all of the paragraphs contained in the Container Freight Station Supplements negotiated by and between PMA and ILWU which limit, restrain, restrict, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and

unenforceable and are to be stricken from said agreement.

(2) Post at their business offices, meeting halls, and all dispatch halls copies of the attached notice marked "Appendix B."[15] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by a representative of Respondent International Union, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicious places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Unions to insure that said notices are not altered, defaced, or covered by any other material.

(3) Furnish said Regional Director with signed copies of the aforesaid notice for posting by California Cartage Company, Inc., Pacific Motor Trucking Company, International Cargo Services, Inc., and Richmond Export Services, Inc., or such of said employers as may be willing, at all places where notices to their respective employees are customarily posted.

(4) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Unions have taken to comply herewith.

3. Pacific Maritime Association, San Francisco, California, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from entering into, maintaining, enforcing, or giving effect to any or all of those

[15]See fn. 14.

sections of the Container Freight Station Supplements negotiated by and between PMA and ILWU which restrict, restrain, limit, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify all company members of the Pacific Maritime Association that any previous instructions, requests, or appeals which Respondent PMA may have made against loading or unloading containers that have been stuffed, or are to be unstuffed, by non-ILWU personnel are to be withdrawn and to have no force or effect.

(2) Notify all company members of Pacific Maritime Association that any and all provisions of the Container Freight Station Supplements which have been negotiated between the PMA and ILWU which restrain, restrict, limit, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(3) Mail to each of their member companies and post at their man office in San Francisco and at each area office copies of the attached notice marked "Appendix C."[16] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent PMA's representative, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive

[16]See fn. 14.

days therefter, in conspicuous places, including all places where notices to member companies are customarily posted. Reasonable steps shall be taken by Respondent PMA to insure that said notices are not altered, defaced, or covered by any other material.

(4) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent PMA has taken to comply herewith.

Dated, Washington, D.C., Feb. 11, 1974.

Edward B. Miller, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member
Ralph E. Kennedy, Member
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

[Seal]

Supreme Court, U. S.
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No. 75-684

In the Supreme Court of the United States

OCTOBER TERM, 1975

PACIFIC MARITIME ASSOCIATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The decision and order of the National Labor Relations Board are reported at 208 NLRB 994 (Pet. App. iii-xxii).[1]

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[1] The decision of the administrative law judge, which the Board adopted with modifications, was reprinted in the three-

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1975 (Pet. App. i-ii). Petitions for rehearing were denied on August 11, 1975 (Pet. 2). The petition for a writ of certiorari was filed on November 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that certain supplements to the collective bargaining agreement between Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union (ILWU) were designed to enlarge work opportunities for employees in the PMA-ILWU unit, rather than to preserve or reclaim work of that unit, and thus violated Section 8(e) of the National Labor Relations Act (the Act).

2. Whether the Board properly found that ILWU and certain of its Locals violated Section 8(b)(4)(B) of the Act by enforcing the 1970 Container Freight Station Supplement with an objective of forcing or requiring PMA and its members to cease doing business with California Cartage Company, Inc.

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volume appendix filed in the court of appeals (I Vol. 27-55). We have lodged copies of these volumes with the Clerk of this Court.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition at pp. 3-4.

STATEMENT

A. The Board's Findings of Fact

1. *Background*

Petitioner Pacific Maritime Association is an association of companies engaged in marine shipping, marine terminal operations and stevedoring on the West Coast. PMA bargains on behalf of its members with petitioner International Longshoremen's and Warehousemen's Union, the bargaining representative of the longshoremen and marine clerks, whose traditional work is to load and unload incoming and outgoing ships for PMA members (ALJ 7-8; GCX 2, paras. 11, 12, 14, GCX 2-I(10), GCXs 2-A, 2-B; Tr. 378-381, 394-396, 757-758, 930, 940-1015, 1137-1139, 1148, 1275).[2]

Before World War II, most cargo handled by longshoremen was in so-called "break bulk" form—that

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[2] "ALJ" refers to the findings of the administrative law judge; "Tr." refers to the transcript of the hearing before the administrative law judge; "GCX" refers to the General Counsel's exhibits; "PMAX," "Cal Cart X" and "PMTX" refer to the exhibits of PMA, California Cartage and Pacific Motor Trucking, respectively. These materials are reprinted in the three-volume appendix filed in the court of appeals, copies of which have been lodged with the Clerk of this Court (see n. 1. *supra*).

is, it was delivered and deposited on the dock by truckmen in loose boxes or bundles and then individually loaded onto wooden pallets or into slings by longshoremen, hoisted onto the ship, removed from the pallet or sling, and stowed below deck (ALJ 12; Tr. 669-671, 1275, 1290-1297). Following World War II, cargo was "unitized" on pallets with either steel bands or glue, so that it remained on the pallet during the voyage and was redeposited on the dock at the end of the voyage on the same pallet (ALJ 12). Prior to 1960, however, ILWU insisted that truckmen (whose traditional work was to deliver cargo to, and pick it up from, the docks (ALJ 12; Tr. 521, 577, 670, 768-769, 1211-1213)) remove the freight from the pallets delivered by them and place it on the "skin of the dock," where it was "repalletized" by longshoremen and loaded aboard ship (ALJ 12; Tr. 520-521, 577).

In addition, some freight was shipped in large, self-contained receptacles. These containers were brought to the docks by truckmen, loaded intact by longshoremen, and, after the voyage, unloaded by the longshoremen and delivered intact to the consignees at the dock. At first, the growth of "containerization" was inhibited by the lifting capacity of dockside hoisting equipment as well as by certain ILWU-imposed restrictions on the maximum load which could be lifted per hoist (Tr. 976, 1349). But, with the advent of more powerful hoisting equipment in the 1950's, larger containers were introduced. The work of filling and removing freight from these containers was

done either by the employees of the consignor or the consignee, or by the employees of the trucking companies, who did the work for their various customers, including shipping lines. Longshoremen filled containers at the docks only when cargo was brought there in "break bulk" form. (ALJ 12; Tr. 100, 105, 109, 421, 647-657, 722-730, 779-783, 820-821).

These technological changes, and the concomitant loss of work for longshoremen, caused a decade of stormy labor relations in the shipping industry on the West Coast (Tr. 1361-1362). The problems did not end until 1960, when PMA and ILWU executed the Modernization and Mechanization Agreement. In exchange for a multimillion dollar payment by PMA into a pension-retirement-unemployment fund, ILWU eliminated its "make work" practices and its artificial restrictions on the size of loads, and authorized PMA to introduce new methods and equipment on the docks, over which ILWU was awarded jurisdiction (Pet. App. vi; ALJ 10; GCX 2-G(14), Tr. 1155-1157, 1341-1342, 1349). The Modernization and Mechanization Agreement was incorporated ultimately into the Pacific Coast Longshore and Clerks' Agreement (PCLCA), the parties' collective bargaining contract (ALJ 10; GCX 2-G(14), para. 52; Tr. 1155).

During the ensuing decade, as a result of the Modernization and Mechanization Agreement, cargo delivered by truck on pallets suitable for lifting di-

rectly aboard ship was not repalletized by longshoremen. Moreover, the practice of delivering cargo to the docks already crated or containerized became more prevalent. These containers were filled either by employees of the manufacturer, the consignor, or their trucking company, and once they were delivered to the dock by truckmen, longshoremen loaded them aboard ship without disturbing their contents. (Pet. App. vii; ALJ 10; GCX 2-G(14), paras. 1, 6; Tr. 1157, 1212-1214, 1349.) But, as in the past, when loose cargo was delivered to the docks, longshoremen placed it on pallets or put it into containers (GCX 2-G(14), para. 16; Tr. 1086-1087).

Modern containers are 8 feet wide and 8 feet high, range in length from 20 to 40 feet, and are capable of holding 10 or more tons of cargo (PMAXs 13, 15, 16; Tr. 270, 448, 941-942, 1052-1054, 1103). Special facilities, including off-dock container freight stations, were built and staffed to accommodate these containers. The off-dock container freight stations—where containers are filled with cargo prior to shipping or emptied after shipment and prior to delivery to the consignee—were operated by non-PMA members and manned by non-longshoremen, usually represented by the Teamsters Union (GCX 2-C, Sec. 1.12; Tr. 113, 433-434, 117-118).

Pacific Motor Trucking Company (PMT) performs container freight station services in the Los Angeles area for several PMA-member shipping lines. PMT employs 25 persons, represented by the Teamsters

Union, to fill and empty containers (ALJ 9, 13; GCX 2, PMTXs 1, 2; Tr. 433-436, 438-439, 448, 450-451, 604, 606, 609, 617, 629, 1336). California Cartage Company (CCC) operates a container freight station a few miles from the San Pedro docks, where it fills and empties containers for several PMA-member shipping lines who use the Los Angeles Container Terminal. CCC's 70 to 75 freight station employees are also represented by the Teamsters Union (ALJ 8-9; GCXs 2-D, 2-E, 2-F; Tr. 81, 113, 114, 117, 125, 127, 129, 130, 1019).

2. *The 1970 Container Freight Station Supplement and ensuing events*

The 1966-1971 PCLCA did not contain any provisions relating to the work performed at container freight stations. On January 5, 1970, ILWU and PMA executed the 1970 Container Freight Station Supplement to that agreement, which purported to bring the filling and emptying of containers at the container freight stations within the scope of the collective bargaining contract.[3] The 1970 Supplement also established two new job classifications for the work performed at container freight stations—with wages, hours and working conditions different from those specified for longshoremen under the PCLCA—and barred the transfer of workers at the container

[3] The 1970 Container Freight Station Supplement provided that "[t]he stuffing and unstuffing [filling and emptying] of containers in a Container Freight Station [CFS] * * * is work covered by this supplement" (ALJ 11; GCX 2-C, Sec. 1.1).

freight stations to longshore duties (GCX 2-C, Secs. 1.22, 1.23, 1.24, 4, 6). The expressed purpose of the 1970 Supplement was "to have all container work brought to CFS [container freight stations] on the dock or in areas adjacent to the dock on or before June 30, 1971" (GCX 2-C, Sec. 1.5). The 1970 Supplement also provided that no PMA member was to "renew, extend or execute new subcontracts for CFS work" after the expiration of a six-month transition period (GCX 2-C, Sec. 1.51). In short, the effect of the 1970 Supplement was to require all filling and emptying of containers loaded or unloaded from ships docked in ports on the West Coast, except for shippers' loads and door-to-door deliveries,[4] to be performed at the docks by employees represented by ILWU (Pet. App. ix).[5]

[4] A door-to-door delivery, like a shipper's load, refers to a container that has been filled by a single manufacturer or owner-consignor, generally at a point a considerable distance from the harbor or port, and is loaded directly aboard the ship and moved directly to the purchaser or consignee (ALJ 11, n. 10). Unlike shippers' loads, however, the responsibility for pickup or deliveries under the door-to-door method lies with the ocean carrier (GCX 3-A, Sec. 1.531(f); Tr. 879, 883, 1355).

[5] The restrictive portions of the 1970 Supplement read as follows (GCX 2-C):

> 1.532 The Employers agree that containers utilized by a steamship company for its own convenience will be unstuffed by men working under this Contract Supplement or under the Pacific Coast Longshore Contract Document.
>
> 1.534 The Employers agree that outbound cargo not shippers' loads will be stuffed or containerized by men working under this Contract Supplement or under the Pacific Coast Longshore Contract Document, except that for a period of six (6) months following the date this Contract Supplement is placed in effect, PMA member companies will be permitted to accept full containers from consolidators and put them aboard ship. The Employers will keep a daily log of such shipments during the six-month period and at the end of the period review with the Union the volume of cargo so handled. If it is determined that the practice involves a minimal number of containers, the Employers will be permitted to continue. Or if it is established that the volume is appreciable, the parties will review this item only and endeavor to reach agreement as to its disposition.

On June 14, 1971, about two weeks before the six-month transition period provided for in the 1970 Container Freight Station Supplement was due to expire, ILWU informed its various locals by letter that "all containers not stuffed [filled] by the registered work force will not be loaded aboard ship after 12:01 a.m., June 30, 1971," unless they were excepted shipments. The same letter appeared in the official ILWU publication sent to its locals and their members. On or about June 24, 1971, petitioner Local 13 published an article in its publication stating that "the program of not working containers on June 30, 1971—other than those stuffed or unstuffed by longshoremen, and the exceptions outlined in the contract, is still in effect" (ALJ 18-19; GCX 2, paras. 7-9).

On June 29, 1971, the president of Local 13 and the vice president of petitioner Local 63 told their respective members employed at the Los Angeles

Container Terminal that they were not to accept or handle containers filled, or to be emptied, by non-ILWU personnel, unless the containers were shippers' loads. The night stevedore superintendent at the Los Angeles Container Terminal also was informed of these instructions. The following morning, CCC's vice president was informed by officials of Local 63 that a container filled by employees of CCC bound for PMA-member Mitsui could not be accepted at the Los Angeles Terminal in accordance with the 1970 Container Freight Station Supplement. When CCC requested the manager of the Los Angeles Terminal to order the marine clerk to accept the container, the manager indicated that the longshoremen would strike if he gave that directive. CCC then returned the Mitsui container to its off-dock freight station and has not attempted subsequently to deliver to the Los Angeles Terminal any containers filled by its employees. A similar refusal to handle occurred the same morning when CCC attempted to pick up an inbound container at another PMA facility. (ALJ 11, 19-20; Tr. 133-141, 143, 349, 355-360, 411-418.)

On approximately February 10, 1972, after an economic strike by ILWU had been enjoined under the national emergency provisions of the Labor-Management Relations Act, PMA and ILWU executed a memorandum of understanding, effective to July 1, 1973, which revised and renewed the 1966-1971 PCLCA, which had expired. The memorandum of understanding included, in modified form, the terms

of the 1970 Container Freight Station Supplement (Tr. 1130). The amended Supplement provided, *inter alia*, for a $1.00 per ton tax on all containers filled or emptied by non-ILWU labor within 50 miles of each port, with certain exceptions, and mandated that all containers originating in or destined for delivery within that area, which were shipped on a non-PMA member vessel, were to be filled or emptied by ILWU members (ALJ 11; GCX 3-Appendix A, Secs. 1.54, 1.55).

B. The Decisions Below

Upon the foregoing undisputed facts, the Board, in substantial agreement with the administrative law judge, concluded that petitioners had violated Section 8(e) of the Act by entering into the 1970 and 1972 Container Freight Station Supplements and that ILWU and its Locals 13 and 63 had violated Section 8(b)(4)(B) of the Act by refusing to handle containers filled, or to be emptied, by CCC employees (Pet. App. xv). The Board found that petitioners were not attempting by these agreements to preserve or reclaim the work of filling and empting cargo in modern containers for ILWU-represented longshoremen, but rather were seeking to enlarge the work opportunities for employees in the PMA-ILWU bargaining unit (Pet. App. ix-xv). The Board ordered petitioners to cease and desist from such unfair labor practices, to notify their members that they have no objections to their handling containers filled or to be

emptied by non-ILWU members, and to notify members that the 1970 and 1972 Container Freight Station Supplements are void and unenforceable (Pet. App. xv-xxii).

The court of appeals enforced the Board's order, concluding that the Board's findings and order were supported by substantial evidence on the whole record (Pet. App. i-ii).

ARGUMENT

In *National Woodwork Manufacturers Ass'n* v. *National Labor Relations Board*, 386 U.S. 612, 644, this Court held that whether an agreement restricting business relations between two persons violates Section 8(e) of the National Labor Relations Act depends upon "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the unit] employees, or whether the agreements * * * were tactically calculated to satisfy union objectives elsewhere [footnote omitted]." If the agreement has the former objective, it is primary and lawful; if it has the latter objective, it is secondary and unlawful.

Under these principles, unions and employers lawfully may enter into agreements that prohibit subcontracting of work normally performed or "fairly claimable" by employees in the bargaining unit covered by a particular contract, because such provisions have the valid, primary purpose of protecting the jobs of the employees in that unit. See *Meat and Highway Drivers, Local 710* v. *National Labor Relations Board*, 335 F.2d 709, 713 (C.A.D.C.). On the other hand, agreements that seek to acquire for the employees of the primary employer work that is " 'neither unit work nor fairly claimable as unit work' " (*Sheet Metal Workers, Local 223* v. *National Labor Relations Board*, 498 F.2d 687, 696 (C.A.D.C.)) are secondary in design and impact.[6] Such agreements are unlawful because they reach beyond the primary bargaining unit and affect work historically performed by employees of another employer in another work unit.

The basic question presented by the petition is whether the Board properly concluded that the 1970 and 1972 Container Freight Supplements, insofar as they required that filling and emptying of all containers (except shippers' loads and door-to-door deliveries) be performed by employees represented by ILWU, sought to enlarge the work opportunities for the PMA-ILWU bargaining unit, rather than merely to preserve dock work traditionally performed or fairly claimable by the employees in that unit. Such an issue, involving only the application of settled principles to the particular facts of this case, does not warrant review by this Court. As the facts sum-

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[6] In the *National Woodwork* case, *supra*, Mr. Justice Harlan, whose vote was necessary for the Court's decision, emphasized in a separate concurring opinion that that was "not a case of a union seeking to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs." 386 U.S. at 648.

marized in the Statement (pp. 3-11, *supra*) show, moreover, the evidence relied upon by the Board fully supports its conclusions.

As noted, the traditional work of longshoremen has been to load and unload ships, and, to the extent they have filled containers at the docks, that work has been simply incidental to their primary functions. At no time prior to 1970 did any employees covered by the PMA-ILWU collective bargaining agreement render any container freight station services; until then, the container freight station work was performed exclusively by non-longshore employees. Indeed, as the Board found (Pet. App. vi-vii, xii), the ILWU in effect bargained away in 1960 any claim to this work by agreeing, in the Modernization and Mechanization Agreement, that the problem of employee displacement resulting from technological change would be met, not by continuing to restrict such change, but by substantial employer payments into a fund to be used for longshore employees' pension, retirement and unemployment benefits.

The terms of the Container Freight Station Supplements also demonstrate that both PMA and ILWU recognized that container freight station work is different from the unit work traditionally performed by longshoremen. Thus, the Supplements established new, discrete classifications—CFS Utilitymen and CFS Clerks—for those employees assigned to the off-dock container freight stations. The wages, hours and working conditions established for these new

classifications are significantly different from those applicable to the longshore and clerk employees governed by the PCLCA. Men who are not registered as longshoremen may acquire regular positions at container freight stations, although they would have no such privilege under the PCLCA. Separate seniority dates are also provided for the CFS Utilitymen and CFS Clerks, and their transfer to traditional longshore work is specifically prohibited (GCX 2-C, Secs. 1, 4, 6, 7).

On this record, the Board was fully warranted in concluding that the container freight station work is "'neither unit work nor fairly claimable as unit work.'" *Sheet Metal Workers, Local 223* v. *National Labor Relations Board, supra,* 498 F.2d at 696. Rather, it is separate and distinct from the work traditionally done by the PMA-ILWU bargaining unit employees at the docks.

The cases relied on by petitioners (Pet. 27-32; Supplemental Pet.) do not support their contention to the contrary. In *American Boiler Mfrs. Ass'n* v. *National Labor Relations Board,* 404 F.2d 547 (C.A. 8), certiorari denied, 398 U.S. 960, the court held that a union could lawfully strike to "reacquire, as well as preserve, [unit] work" (404 F.2d at 551); it made clear, however, that its conclusion did not extend to agreements "to acquire work which unit employees had never performed or work which they may have performed in the past but have completely lost before the clause was negotiated" (*id.* at 552). In *Meat and Highway Drivers, Local 710* v. *National*

Labor Relations Board, supra, the unit employees historically had performed on an exclusive basis the work sought to be recaptured (335 F.2d at 712, 714); the PMA-ILWU unit employees involved here have never exclusively performed the disputed container work and have never performed at all such work at facilities located off the docks.

In *Canada Dry Corp.* v. *National Labor Relations Board,* 421 F.2d 907 (C.A. 6), the disputed work was identical to the traditional work performed by unit employees (*id.* at 909); here, the container freight work claimed by ILWU is not identical to the principal work of the unit—the loading and unloading of cargo aboard ships. In *Humphrey* v. *International Longshoremen's Ass'n,* No. 75-441-N (E.D. Vir., decided September 30, 1975) (Supplemental Pet. App. i-xiv), the court found that the unit employees initially had performed the disputed work and that, despite a subsequent eight-year hiatus in their performance of that work, the "contract provisions in issue were intended and operate solely to preserve historical work practices" (Supplemental Pet. App. xiii); by contrast, the disputed work involved in the present case (the filling and emptying of containers at off-dock container freight stations) was not performed prior to 1970 by PMA-ILWU bargaining unit employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1975

No. 75-684

PACIFIC MARITIME ASSOCIATION AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AND ITS LOCALS 13, 63, 10, AND 34, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
PACIFIC MOTOR TRUCKING CO. AND CALIFORNIA CARTAGE COMPANY, INC., *Intervenors*

BRIEF OF INTERVENOR PMT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the court of appeals erred in finding that there was substantial evidence to support the NLRB's decision that the agreements between petitioners were

for the purpose of effecting an unlawful secondary objective, in violation of Sections 8(b)(4) and (e) of the National Labor Relations Act, since these agreements were tactically calculated to take for petitioner ILWU work not traditionally its own.[1]

COUNTERSTATEMENT OF THE CASE

I. Parties and Proceedings Below

In late 1971, Pacific Motor Trucking Co. (PMT) and California Cartage Co., Inc. (Cal Cartage) filed charges with the National Labor Relations Board against the ILWU and the PMA. The charges alleged that the Container Freight Station Supplement (1970 and 1972 CFS Supplements) agreements between PMA and ILWU to refuse to handle containers "stuffed" (packed) or "unstuffed" (unpacked) by PMT or Cal Cartage employees, constituted violations of Sections 8(b)(4)(i), (ii) (B) and (e) of the National Labor Relations Act (Act), 29 U.S.C. §§ 158(b)(4)(i), (ii) (B), and (e).

Complaints were issued by the General Counsel of the NLRB and heard before an Administrative Law Judge (ALJ).[2] A decision was issued by the ALJ on

[1] References to the decision of the court of appeals will be directed to Appendix A to the Petition and will be cited as "App. A. at ——." References to the decision of the National Labor Relations Board will be directed to Appendix B to the Petition and will be cited as "App. B at ——." References to the Petition and the Supplemental Petition will be cited as "Pet. at ——" and "Supp. Pet. at ——."

[2] Initially, the charge focused on the 1970 CFS Supplement. After the hearing, PMT and Cal Cartage filed additional charges, based on an agreement between the ILWU and PMA of February 10, 1972 (1972 CFS Supplement) which included the 1970 CFS Supplement in a modified form. The NLRB then issued a consolidated complaint. The ALJ then reopened the proceeding, consolidating both the new complaint and additional complaints based on charges brought by International Cargo Services, Inc. and Richmond Export Services, Inc.

October 19, 1972, finding that the PMA and ILWU had violated Section 8(b)(4) and (e) of the Act by entering into, maintaining, and enforcing the provisions of the 1970 and 1972 CFS Supplements.

Subsequent to the filing of exceptions, the full NLRB unanimously affirmed the ALJ's decision and adopted his recommended order.[3] The present petitioners then appealed to the United States Court of Appeals for the District of Columbia Circuit. On a cross-petition to enforce the order, the court of appeals upheld the NLRB without opinion.[4]

II. Factual Background

The jurisdiction of longshoremen historically has been defined in terms of location—namely the docks. The work of longshoremen involves principally the loading and unloading of ships and other incidental functions performed *at the docks*. Yet, through the device of the CFS Supplements to the PMA-ILWU Pacific Coast Longshore and Clerk's Agreement, ILWU sought to acquire the off-dock work of stuffing and stripping containers, work which traditionally had been done by teamsters and others not members of the ILWU-PMA bargaining unit. A brief review of the history of cargo handling and the growth of container freight stations places the non-longshoreman work tradition in clear perspective.

[3] App. B. The NLRB slightly modified the ALJ's findings of law. *Id.* at xiii-xv.

[4] App. A.

History. As early as the 1940s, teamsters had important work functions relating to the packing and unpacking of cargo. Usually, outbound cargo was delivered to the dock area by truck at which time the truck driver unloaded or stripped the cargo from the truck in loose or in palletized form, onto the "skin of the dock." [5] The "skin of the dock," so to speak, defined the jurisdiction of longshoremen who would then reload the cargo on their own pallets for transfer for storage on shipboard.[6] This process was reversed for inbound cargo.[7]

The normal practice, therefore, involved substantial duplication of work. On outbound shipments, teamsters would unpack cargo from trucking pallets at the skin of the docks only to be repacked onto shipping pallets by longshoremen, and, on inbound cargo, the reverse of this process applied. However, in 1960, PMA and ILWU entered into a Mechanization and Modernization Agreement in which the ILWU, in exchange for substantial benefits and guarantees, agreed to eliminate make-work practices such as repalletization of cargo. The Agreement stated that cargo on pallet or other forms of unitized cargo or loads "shall not be rehandled" on receipt to or discharge from the dock. Thereafter, palletized and other forms of "unitized" cargo stuffed and delivered by teamsters was loaded

[5] Transcript of Proceedings before NLRB in this case (hereinafter Tr.) 65, 577-78, 666-71.

[6] Tr. 65, 577-78, 670-71, 805-06, 1213.

[7] Tr. 109-11, 578-79. During this early period, there were some forms of containers used for handling special cargo which involved stuffing and stripping work by teamsters without rehandling by longshoremen. Tr. 844, 641, 681, 700.

directly aboard ships and discharged from the skin of the dock without rehandling by longshoremen.

During the late 1950s and 1960s, both teamster and longshore handling of cargo at dockside began to be affected by the advent of the modern containers.[8] Many shipping lines constructed new, fully containerized ships. The containers differed from earlier cargo units in both size and design. They were at least 20 feet long and more often 24 or 40 feet (Tr. 69, 86, 88). Rather than being loaded into a truck, these containers actually were the truck-trailer van and would merely be unloaded from a chassis and power unit to be hoisted aboard ship (Tr. 344-47).

By their design, container ships require that all cargo of the shipper be containerized. From the very beginning, the steamship companies have contracted with trucking companies, such as PMT, for the purpose of establishing off-dock Container Freight Stations (CFS), at which locations trucking employees would stuff and strip containers, warehouse, and distribute freight (Tr. 119-20).

In 1959, PMT established a Container Freight Station to perform stuffing and stripping for the first container ship—the Matson *Hawaiian Citizen.* Throughout the 1960s, the Container Freight Station work of PMT, as well as the CFS business of the other trucking companies, increased substantially with the growth of container ships. By the end of the 1960s, various

[8] Increased mechanization in shipping affected teamsters as well as longshoremen. Containerization and other forms of unitized cargoes resulted in a decrease in the need to pack and unpack cargoes from the original point of load to the ultimate destination. *See, e.g.,* Tr. 157, 449-450, 462, 982-83.

trucking companies operated over thirty Container Freight Stations in the Los Angeles/Long Beach areas using teamster labor (Tr. 216, 220, 223). Significantly, there were no Container Freight Stations manned by longshoremen prior to the execution of the CFS Supplement in 1970 (Tr. 746-48, 946; *see also* App. B at viii). PMA members did operate two container freight stations that were manned by non-longshore employees known as terminal warehousemen who were not part of the PMA-ILWU longshoremen bargaining unit.[9]

The CFS Supplements. In the face of the universal practice of stuffing and stripping containers at container freight stations manned by teamsters or others not within the ILWU-PMA longshoremen bargaining unit, ILWU and PMA in the 1970 Container Freight Station Supplement agreed that all container stuffing and stripping work, other than shipper's loads and door-to-door deliveries, was to be brought to the dock where it would be performed exclusively by ILWU members (App. B at ix). A "transition period" was provided in order to allow PMA members "additional necessary time to build, lease or provide for a new facility" for a Container Freight Station using ILWU members.[10]

An objective to benefit the ILWU generally and non-bargaining unit union members (terminal warehousemen) in particular is apparent from the terms of the

[9] Tr. 961, 1010-12, 1194-95. Terminal Warehousemen are not full longshoremen, and, though members of ILWU, work as an entirely separate unit from Class A and B longshoremen. Tr. 964, 1066, 1250.

[10] General Counsel's Exhibit 2(C), Section 1.51. General Counsel's Exhibits will hereinafter be cited as G.C. Ex. ——. *See also* App. B at ix.

Supplement. The 1970 Supplement created new employee job descriptions of "CFS Utilitymen" and "CFS Clerks", who were to perform all types of work at the CFS, including stuffing and unstuffing of containers under terms of employment entirely different from regular longshoremen, but similar to those of terminal warehousemen. These employee classifications were to work exclusively in the CFS, and were absolutely restricted from transfer "to longshore work outside the CFS under the terms of any of the Agreements." Similarly, non-CFS longshoremen were permitted to perform work related to the CFS only under very narrowly defined circumstances.[11]

On February 10, 1972, the ILWU and PMA implemented a new Container Freight Station Supplement.[12] The 1972 Supplement modified the 1970 Supplement by adding a "container tax" of $1.00 per ton on non-ILWU stuffed or unstuffed containers, which was to be allocated to the Union's Pay Guarantee Plan.[13] In addition, the 1972 Supplement expressly mandated that "PMA members shall discontinue their past practice" of utilizing companies not party to the PMA/ILWU Agreements for the stuffing and unstuffing of containers, but authorized a 90 day grace period for the employers "to build, expand, lease, equip, or provide facilities . . . ." [14]

The enforcement of these Supplements, effecting a boycott of containers stuffed or to be stripped by PMT

[11] G.C. Ex. 2(C), Sections 1.23 and 1.3-1.32.

[12] G.C. Ex. 3, Appendix A.

[13] *Id.*, Section 1.53.

[14] *Id.*, Section 1.57.

and Cal Cartage, led to the filing of charges and subsequent legal proceedings below. Based on the above facts, the NLRB rendered an opinion that the CFS Supplements were tactically calculated to benefit the ILWU generally and sought to acquire work that had not been traditionally the work of the union. Finding these Supplements violative of Sections 8(b)(4) and 8(e) of the Act, the NLRB issued an order that the petitioners cease and desist from maintaining or implementing the Supplements. The court of appeals found the Board's decision to be supported by substantial evidence and enforced the order of the NLRB.

REASONS FOR DENYING THE WRIT

I. The Decision in This Case Does Not Conflict with the Prior Decisions of This Court.

In seeking a Writ of Certiorari, petitioners have attempted to construct a conflict between the decision below and this Court's ruling in *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612 (1967). No such conflict exists. In fact, quite to the contrary, the decision in this case conforms to and properly applies the guidelines set forth in *National Woodwork* for determining whether a boycott provision is permissible work preservation or unlawful secondary work acquisition.

In evaluating such boycott provisions, this Court in *National Woodwork* laid down a standard calling for consideration of "all the surrounding circumstances" to determine whether the Union's objective was work preservation or whether the agreement and the boycott were tactically calculated to satisfy general union objectives. The Court pointed to such circumstances as the history of labor relations, the economic personality

of the industry and the threat of displacement by the banned product or services. 386 U.S. at 644 n.38. It was recognized that the difference between primary work preservation and unlawful secondary work acquisition might involve difficult factual determinations:

> There need not be an actual dispute with the boycotted employer . . . for the activity to fall within this [prohibited] category . . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees. This will not always be a simple test to apply. [*Id.* at 645 (footnotes omitted).]

In *National Woodwork*, the NLRB had determined, in light of the facts of the case, that the objective and effect of the agreement in question was work preservation and not secondary work acquisition. This Court found the NLRB's decision to be supported by substantial evidence. In the present case, however, the Board found that the CFS Supplements had an unlawful secondary purpose and effect. The record below contains substantial, if not overwhelming, evidence that the CFS Supplements at issue were devices for expanding ILWU's general work opportunities by forcing to the docks work that had traditionally been performed at non-waterfront Container Freight Stations by non-ILWU labor.

The absence of legitimate work preservation objectives is also demonstrated by the fact that the Supplements established a wholly new work unit of new employee classifications working under entirely different terms of employment than otherwise apply to longshoremen. The record contains substantial evidence that, rather than preservation of any existing long-

shore jobs, the Supplements in purpose and effect benefited the ILWU membership in general and non-longshoreman "terminal warehousemen" in particular.[15]

Based on the NLRB's factual determinations of unlawful secondary activity, which findings are clearly supported by substantial evidence, this case falls well within the teachings of *National Woodwork*.[16] The relevant factual circumstances were considered and the correct conclusions reached.

Petitioners have contended that the NLRB improperly considered the severity of the potential impact of the 1970 and 1972 CFS Supplements upon other employers and employees in declaring them invalid.[17] However, such an investigation by the Board was clearly within the contemplation of *National Woodwork*. In delineating the "surrounding circumstances" to be considered in an inquiry as to whether a particular agreement had as its objectives work preservation or the satisfaction of "union objectives elsewhere," the Court there listed "the economic personality of the in-

[15] *See* note 9, *supra*, and related text.

[16] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[17] For example, the NLRB noted the following:

> [I]t is clear from the language of the Supplements that the ILWU's claim to container stuffing work . . . extends broadly to all containers entering or leaving Pacific coast docks, whether or not the owners of the containers are members of PMA and statutory employers of employees within the longshore unit represented by ILWU.
>
> • • • •
>
> While the ILWU does not now seek all container work, the logic of its position is that it is legally entitled to all such work without regard to the identity of the competing employees. Obviously, a boycott to enforce a claim to stuff shippers' loads and door-to-door deliveries would have an enormous impact on the shipping industry. [App. B. at x, xiii.]

dustry" (389 U.S. at 644 n. 38). The latter phrase obviously encompasses the potential economic effect of a boycott on other employers and employees within the industry.

Petitioners also assert that the NLRB's decision contravenes *National Woodwork* in that "an agreement to assign the technological successor of what has been traditional work is also valid work preservation."[18] However, this case involves no such "technological successor" work. The NLRB found, on the basis of extensive evidence, that the work which the ILWU coveted had been performed by teamster labor since prior to World War II.

Similarly, petitioners argue that the loss in longshore opportunities due to general technological changes should permit ILWU to capture work which ILWU members never lost. Such an argument would provide limitless justification for work acquisition and is not supported by *National Woodwork* or any other authority.[19]

II. The Decision Below Creates No Conflict with the Decisions of Other Circuits.

Petitioners also claim that the decision in this case is in conflict with other cases decided by the courts of appeals. Specifically, petitioners contend that the NLRB failed to consider the doctrines of "work recapture" and "fairly claimable work." As support,

[18] Pet. at 25.

[19] As Mr. Justice Harlan noted in his memorandum supporting the majority opinion in *National Woodwork:*

> This, then, is not a case of a union seeking [a] . . . boycott, for the purpose of acquiring for its members work that had not previously been theirs. [386 U.S. at 648.]

they cite several cases decided on grounds of those doctrines.[20]

This attempt to create conflict where none exists also must fail. Each of the cases cited by petitioners was decided on its own facts, which in each instance are inapplicable to the present case. In short, there is no conflict with any decision of another circuit.

Thus, *American Boiler Manufacturers' Association* v. *NLRB*, 404 F.2d 547 (8th Cir. 1968), *cert. denied,* 398 U.S. 960 (1970), and *Meat & Highway Drivers, Local 710* v. *NLRB*, 335 F.2d 709 (D.C. Cir. 1964), stand for the proposition that labor-management agreements can legitimately provide for the reacquisition of traditional unit work which has been partially lost. No such issue is involved in this case. The stuffing of containers away from the dock area at container freight stations was not the traditional work of the ILWU. The ILWU was attempting to extend its jurisdiction to an area where it had no traditional work. Under those circumstances, the issue of work recapture does not rise.

The cases relying on the concept of "fairly claimable work" are equally inapplicable here. For example, *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907 (6th Cir. 1970), involved work which was identical, in kind and location, to that being performed contemporaneously by the retail clerks' union members.[21] Moreover, the record in that case showed that the clerks had previously performed shelving tasks with respect to the brand name goods in issue. 421 F.2d at 909. None of the cases under the "fairly claimable" doctrine involves the establishment of new classifications to

[20] Pet. at 27-34.

[21] *See* Pet. at 31.

perform newly acquired work under entirely different terms and conditions of employment. None of the cases involve such a patent use of negotiating leverage by a union to acquire work that was never its own.

In this case, the ALJ considered the "work recapture" and "fairly claimable" doctrines and found them inapplicable under the circumstances. The NLRB, quite properly, adopted the findings of the ALJ in this regard. The argument of petitioners, that the NLRB failed to consider and apply these principles, is wholly without basis.

Finally, petitioners contend that the decision below permits a different legal standard to apply for the performance of container work on the East Coast and on the West Coast of the United States.[22] In making this argument, petitioners rely upon the decision of an administrative law judge in *International Longshoremen's Association (Consolidated Express, Inc.),* NLRB Case No. 22-CC-541 (1974), and the recent district court decision in *Humphrey* v. *International Longshoremen's Association,* — F. Supp. —, 90 LRRM 2838 (E.D. Va. 1975). These cases, however, do not provide support for petitioners' contention. The former decision was reversed on appeal, with the NLRB holding that the East Coast agreements on container work (similar to those in this case) constituted secondary work acquisition and not work preservation. 221 NLRB No. 144 (Dec. 4, 1975). The latter case involved a request for injunctive relief pending resolution by the NLRB. It was based on different facts, different bargaining history, and a different collective bargaining agreement than the instant case.

[22] Supp. Pet. at 7.

In summary, the central issue remains whether, through the 1970 and 1972 CFS Supplements, ILWU sought work preservation or unlawful work acquisition to benefit the union generally. Resolution of this issue involves principally factual determinations. The NLRB considered all the facts before it and applied these facts to the legal standards enunciated in *National Woodwork* and other cases. The decision is supported by substantial evidence and should not be disturbed.

CONCLUSION

For reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-684

PACIFIC MARITIME ASSOCIATION AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AND ITS LOCALS 13, 63, 10, AND 34, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PACIFIC MOTOR TRUCKING CO. AND CALIFORNIA CARTAGE COMPANY, INC., *Intervenors*

SUPPLEMENTAL BRIEF OF INTERVENOR PMT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit

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Pursuant to Rule 41(5) and the requirements of this Court, Intervenor Pacific Motor Trucking Co. (PMT) hereby files this printed supplemental brief which is a verbatim repetition of the text of the letter sent by PMT to the Court on February 6, 1976.

TEXT OF LETTER DATED FEBRUARY 6, 1976

This responds to a letter of petitioner Pacific Maritime Association (PMA) dated January 21, 1976. The

letter requests the Supreme Court to defer action on the subject petition for a writ of certiorari in the hope that a conflict may arise between this case and one pending before the Second Circuit Court of Appeals, namely, *ILA* v. *N.L.R.B.,* Docket No. 75-4266.

The case in the Second Circuit is still in an early stage. Although it is being handled on an expedited basis and briefs of appellants have been filed, answering briefs are not due until February 23, and reply briefs are not due until early March. Oral argument has not yet been scheduled.

That case was decided by the NLRB in a manner wholly consistent with the instant case. There is thus no present conflict warranting review by this Court or deferral of action on the instant petition. Furthermore, there is no reason to believe that the Second Circuit's decision will be inconsistent with the decision below. If a conflict in the circuits does arise subsequently, this Court will have an opportunity to resolve it at a later date. The possibility of a future conflict affords no basis for review or deferral at this time. Petitioner's request for postponement should be denied.

Respectfully submitted,

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